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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS, PETITIONER,

vs.

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1933

CERTIORARI GRANTED APRIL 10, 1933

(37,429)

(37,429)

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E-60-94

RICHARD REID ROGERS, Plaintiff,

against

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. Riggio, and The American Tobacco Company, Defendants

RICHARD REID ROGERS, Plaintiff,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants

Consolidated Cause

STATEMENT

This is a consolidated cause formed of two original suits, as follows:

First, an action instituted in the Supreme Court, County of New York, State of New York, by Richard Reid Rogers as plaintiff, against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company. Defendants Neiley and The American Tobacco Company served March 30, 1931; defendants Penn and Riggio served March 31, 1931; defendant Hill served April 2, 1931. Defendant Mower has never been served. [fol. 2] Defendant Penn, a resident of North Carolina, died October 22, 1931, and the action has not been revived against his estate. A notice of examination before trial of defendant, The American Tobacco Company, through its President, George W. Hill, and examination of defendant Hill personally, was served March 30, 1931. The action was removed to the United States District Court for the Southern District of New York by petition of The American Tobacco Company served March 31, 1931, and by peti-

tion of Charles A. Penn served April 18, 1931, in each case on the ground of diverse citizenship, the company being a New Jersey corporation and Charles A. Penn a resident of North Carolina, and a separable controversy was set forth as to each removing party. Certified copies of the transcript of the record were filed in the United States District Court April 4 and 6, 1931, and April 20, 1931. A motion to remand to the State Court was denied as to both petitions November 6, 1931. An order was signed by the Honorable John C. Knox, United States District Judge for the Southern District of New York, April 6, 1931, enjoining and restraining plaintiff from taking any further proceedings in the above cause of any kind or nature whatsoever in the Supreme Court, New York State, and also from proceeding with the examination before trial.

Second, an action instituted in the United States District Court for the Southern District of New York, by Richard Reid Rogers, as plaintiff, against Thomas R. Taylor and The American Tobacco Company. The American To-
[fol. 3] bacco Company was served May 28, 1931 and Thomas R. Taylor was served June 8, 1931.

By stipulation of the parties and an order entered thereon November 24, 1931, the two actions were consolidated into one action in this Court and the orders and proceedings heretofore had in said causes were made orders and proceedings in the consolidated cause. The amended complaint served in Rogers v. Hill, et al. (Equity 59-115) to serve as amended complaint in Rogers v. Taylor, et ano. (Equity 60-94). Any answer filed in Rogers v. Hill, et al. (Equity 59-115) to be deemed an answer in Rogers v. Taylor, et ano. (Equity 60-94).

Motions for further and better particulars in Rogers v. Hill, et al. (Equity 59-115) and Rogers v. Taylor, et ano. (Equity 60-94), were granted November 6, 1931. A stipulation and order thereon in Rogers v. Hill, et al. (Equity 59-115) was entered November 6, 1931, providing that the information to be furnished was furnished in the amended complaint served in this action subsequent to the motion except certain items to be furnished separately in a bill of particulars. Such bill was to be deemed as if incorporated and set forth at length in the amended complaint. A bill setting forth further particulars was received November 11, 1931 in the action numbered Equity 59-115. Stipulation

and order thereon in Rogers v. Taylor, et ano. (Equity 60-94) entered November 6, 1931, providing for the service of a bill of particulars in lieu of an amended complaint. [fol. 4] Such bill to be considered as if incorporated and set forth at length in the complaint therein. A bill setting forth further particulars received November 11, 1931 in the action numbered Equity 60-94.

There has been no change in the party-plaintiff herein. The only defendants now before the Court are George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, all of whom have appeared in the consolidated cause.

An amended complaint in Equity 59-115, to be considered the amended complaint in the consolidated cause, was filed November 30, 1931.

The answer of defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, was filed December 7, 1931.

No question has been referred to a Commissioner, Master or Referee.

None of the defendants has been arrested, nor has any bail been taken or property attached or arrested.

A motion on the pleadings was made by plaintiff in the District Court:

(1) For an order striking out the separate defenses in the answer of defendants Hill, et al.;

(2) For a decree adjudging the by-law of 1912 invalid, requiring the defendants Hill, Neiley and Riggio to account for all payments received by them thereunder, and enjoining further payments thereunder; and

[fol. 5] (3) In the alternative, for an injunction pendente lite restraining further payments under said by-law.

Heard by Judge Caffey January 15, 1932.

Opinion rendered by Judge Caffey March 18, 1932, and order dated March 23, 1932, and entered March 24, 1932, granting plaintiff's motion for an injunction pendente lite.

Bond on injunction approved and filed March 30, 1932; writ of injunction issued, served and filed, March 31, 1932.

Appeal allowed March 31, 1932.

[fol. 6] IN UNITED STATES DISTRICT COURT

In Equity. 60-94. Consolidated Cause

[Title omitted]

NOTICE OF MOTION FOR DECREE, ETC.

Please take notice that at a stated term of this Court for the hearing of motions to be held in the United States Post Office Building in the Borough of Manhattan and City of New York on the 12th day of January, 1932, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, a motion will be made for the following relief:

1. Upon the amended complaint filed by the plaintiff herein, with the exhibits accompanying same and made a part thereof, the bill of particulars furnished by the plain-[fol. 7] tiff, and the answer of the defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, all of which are on file in the office of the Clerk of this Court; for an order striking out the First, Second, Third, Fourth and Fifth Separate Defenses of the said answer, upon the ground that they are irrelevant and insufficient and do not constitute legal defenses to the said complaint.

2. Upon all of the pleadings in said suit, to-wit, the aforesaid amended complaint with the exhibits accompanying same and made a part thereof, the aforesaid bill of particulars and the aforesaid answer of the defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, all of which are on file in the office of the Clerk of this Court; for a decree adjudging the by-law of 1912 invalid, requiring the defendants George W. Hill, C. F. Neiley and Vincent Riggio to account for all payments severally received by each of them thereunder, and enjoining the defendant The American Tobacco Company from making any further payments thereunder.

3. In the alternative to the relief mentioned in paragraph 2 of this notice of motion, if the same be not granted, and upon the aforesaid amended complaint, duly verified, with the exhibits accompanying same and made a part thereof, the aforesaid bill of particulars, duly verified, and the affi-

davit of Richard Reid Rogers annexed hereto, sworn to on [fol. 8] the 7th day of January, 1932; for an interlocutory injunction enjoining the defendant The American Tobacco Company from making any further payments to any president or vice-president under said by-law pendente lite.

Dated New York, N. Y., January 7th, 1932.

Richard Reid Rogers, Plaintiff in sua Persona. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

To Chadbourne, Stanchfield & Levy, Esqs., attorneys for defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, 25 Broadway, New York, N. Y.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RICHARD REID ROGERS IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Richard Reid Rogers, being duly sworn, deposes and says that he is the plaintiff in the above-styled action and is in personal charge of the conduct thereof. Deponent further states:

This case involves the legality of certain bonus payments made by The American Tobacco Company to its president and five vice-presidents for the years 1921 to 1931, inclusive, approximating $8,170,000. The complaint alleges that [fol. 10] the original by-law passed in 1912 under which these payments were made was ultra vires, illegally adopted and void. As to this issue the facts are fully presented by the pleadings and can be decided without the introduction of further proof than the admissions in the answer. In event that the Court should hold the by-law to be valid and binding on the plaintiff, there would remain the equitable question whether the payments under the by-law of 1912, which, when added to the fixed salaries and other cash emoluments claimed by the individual defend-

ants and admitted by the defendant company, aggregated for the year 1930 alone for the president approximately $1,280,000, and for the vice-president serving the full year from approximately $550,000 to $784,000 each, and will aggregate for the year 1931 considerably in excess of the above amounts, are exorbitant and unreasonable and subject to revision by a court of equity; but this relief is prayed for in the alternative and will only become a matter of equitable cognizance in event the by-law of 1912 is first held to be valid. A decision on the pleadings that the by-law of 1912 was and is invalid would therefore dispose of the whole case.

Deponent further says that it is customary for the defendant company to distribute the profit participation under the by-law of 1912 as soon as the accounts of the company for the previous year terminating December 31st can be made up, and that unless the payments referred to are enjoined they will shortly and in all probability before the end of the month be distributed to the existing president and vice-president, with the exception of defendant Taylor, [fol. 11] as hereinbefore referred to, to the irreparable damage of the company and its stockholders.

Deponent further says that according to the last annual report of the defendant, The American Tobacco Company, the net earnings of the company for the year 1930, after paying profit distribution to the president and vice-presidents were $43,345,370.00; but that the net earnings or profits before such distribution were approximately $45,069,308, as shown by the profit distribution paid the president for that year, to wit, $842,507.72, which sum was 2½ per cent of the excess of the net profits of the company over $11,369,000, as shown in Exhibit A to the answer.

(Sgd.) Richard Reid Rogers.

Subscribed and sworn to before me this 7th day of January, 1932. (Sgd.) Anderson Woods, Notary Public, Kings County, No. 335. Certificate filed in N. Y. County No. 395. Commission expires March 30, 1933. (Seal.)

[fol. 12] In United States District Court, Southern District of New York

In Equity. Consol. 59-115

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendant

Amended Complaint

The plaintiff who sues on behalf of himself and all other stockholders of the defendant, The American Tobacco Company, who choose to come in and contribute to the costs and expenses of this action, alleges by way of amended complaint:

1. He is a citizen of New York and the owner and registered holder of 200 shares of the Common Stock of defendant company acquired in 1916, and 400 shares of the Common Stock B of said Company acquired since 1925.

2. The American Tobacco Company is a corporation organized under the laws of New Jersey prior to 1905, and is engaged in the manufacture and sale of tobacco products. Its principal place of business, where its chief executives have their offices and where its board of directors customarily meets, is at 111 Fifth Avenue in the City of New York.

3. On the first of January, 1931, its capital structure was as follows: Preferred stock having a par value of $100 a [fol. 13] share, authorized $540,010,600, outstanding $52,699,700; Common Stock having a par value of $25 a share, authorized $50,000,000, outstanding $40,242,400; Common Stock B having a par value of $25 a share, authorized $100,000,000, outstanding $76,933,950. In addition, it had outstanding on that date bonds of the par value of $1,064,350. Its current liabilities were approximately $5,000,000, and its current quick assets were approximately $147,000,000.

4. The Common Stock B was authorized by an amendment of the charter in 1920. It has the same financial

status as the Common Stock, but no voting rights on corporate management.

5. The defendant Hill is a resident of New York and from April 6, 1921, to date has been a director of The American Tobacco Company; from April 6, 1921 to April 7, 1926 a Vice-President; and from April 7, 1926 to date President of said Company. The defendant Mower is a resident of New York and from April 6, 1921 to date has been director, and from April 4, 1923 to date a Vice-President of said Company. The defendant Penn is a resident of North Carolina and has been from April 6, 1921 to date a director, and from April 6, 1921 to date a Vice-President of said Company. The defendant Neiley is a resident of New York and has been from April 6, 1921 to date a director, and from May 1, 1929 to date a Vice-President of said Company. The defendant Riggio is a resident of New York and has been from April 4, 1928 to date a director, and from May 1, 1929 to date a Vice-President of said Company.

[fol. 14] 6. The defendant Hill receives fixed salaries of $168,000 a year; his fixed salaries since he became President having been increased from $75,000 during his first three years in office to $144,500 in 1929, and $168,000 in 1930. The defendant Penn receives fixed salaries of $98,000, his fixed salary or salaries have been increased from $45,000, which he drew from 1921 to 1929, to $81,166.66 in 1929 and $98,000 in 1930. The defendant Mower receives fixed salaries of $50,000, his fixed salaries having been increased from $45,000, which he drew from 1923 to 1929, to $49,166.66 in 1929 and $50,000 in 1930. The defendants Neiley and Riggio received fixed salaries of $50,000, having been increased to that amount from $33,333.32, paid in 1929, when they were first elected Vice-Presidents.

7. In addition to their fixed salaries the individual defendants received for 1929 and 1930 cash credits as follows:

	1929	1930
To defendant Hill	$136,507.71	$273,470.76
To defendant Penn	90,702.80	181,708.12
To defendant Mower	45,351.40	90,854.06
To defendant Riggio	45,351.40	90,854.06
To defendant Neiley	44,897.89	89,945.52

The legality of these credits is not admitted, and proceedings have been instituted to effect their restoration to the defendant company; but they were actually received and the defendants assert the right to retain them.

[fol. 15] 8. In addition to their fixed salaries as hereinbefore and the profit distributions hereinafter set out, the individual defendants claim the right to receive as additional compensation for services to be rendered between January 28th and December 31, 1931, the following valuable emoluments: Under a socalled employees' stock subscription plan, claimed to have been adopted by the stockholders of the defendant company July 28, 1930, the legality of which is not admitted, however, and which is the subject of an independent litigation, there was by resolution of the board of directors of defendant company, January 28, 1931, allotted to the several defendants herein by the board of directors upon the recommendation of defendant Hill and accepted by them in writing Common Stock B of the company at $25 a share, which stock had on that day a market value of $112 a share, and now has a market value in excess of $120 a share, as follows: to defendant Hill 13,440 shares, to defendant Penn 8,025 shares, to defendant Riggio 4,000 shares, to defendant Neiley 3,000 shares and to defendant Mower 1,000 shares. Such stock may be paid for by dividends declared thereon or in cash at the option of the allottees; but cannot be delivered whether paid for or not before December 31, 1931.

9. The plaintiff alleges that in addition to the fixed salaries and emoluments hereinbefore referred to the defendant company paid by way of profit distribution to the individual defendants from the year 1921 to 1931 inclusive (the payments made prior to 1921 not being included in the scope of this complaint) the following sums:

[fol. 16] To defendant Hill: $89,833.94 in 1921; $82,902.61 in 1922; $77,336.54 in 1923; $88,894.26 in 1924; $97,059.38 in 1925; $188,643.45 in 1926; $268,761.45 in 1927; $280,203.68 in 1928; $447,870.30 in 1929 and $842,507.72 in 1930.

To defendant Penn: $89,833.94 in 1921; $82,902.61 in 1922; $77,336.54 in 1923; $88,894.26 in 1924; $97,059.38 in 1925; $119,185.88 in 1926; $161,256.85 in 1927; $168,122.20 in 1928; $268,722.18 in 1929; and $505,504.63 in 1930.

To defendant Mower: $16,358.96 in 1924; $24,524.08 in 1925; $100,109.09 in 1926; $161,256.85 in 1927; $168,122.20 in 1928; $268,722.18 in 1929; and $505,504.63 in 1930.

To defendant Neiley: $115,141.87 in 1929 and $409,495.25 in 1930.

To defendant Riggio: $115,141.86 in 1929 and $409,495.25 in 1930.

10. The distributions set out in the preceding paragraph were made under and by virtue of a by-law claimed to have been adopted by the stockholders of defendant company March 13, 1912, commonly known as by-law XII. The said by-law, together with the prior notice to stockholders of the meeting at which it was to be acted on, together with the record of the proceedings of that meeting are hereto attached and made a part hereof as Exhibits A and B.

11. The plaintiff further alleges that upon the basis of current profits, which chiefly due to a recent increase of 45 cents a thousand in the wholesale price of cigarettes, are now running at a rate in excess of $60,000,000 a year, the [fol. 17] profits distributable under by-law XII for the year 1931 will exceed $5,000,000, and that that amount unless enjoined will be distributed shortly after the close of the present year by the defendant company to its President and Vice-Presidents, among whom may or will be included the individual defendants to this action.

12. The plaintiff alleges that the aforesaid by-law under which the profit distribution was made and may hereafter be made was illegal, ultra vires and void for the following reasons: (1) because by the charter of the defendant, The American Tobacco Company, hereto annexed and made a part hereof, as Exhibit C, the directors were empowered to apply any surplus or net profits or earnings over and above the capital stock paid in from time to time only to the acquisition of property, or to the payment of dividends, and were not by any of the terms of said charter authorized to divert to any officer of the company any portion of such profits, surplus or earnings by way of profit participation; (2) because under the General Corporation Laws of New Jersey profit participation by officers or employees of any New Jersey corporation was not legal prior to the passage of Chapter 175 of the Public Laws of 1920, which

by Sub-section b of Section 1 for the first time provided for a participation by all or any of the employees of a New Jersey corporation in the profits of the corporate enterprise; (3) because the charter of the defendant company expressly provided that the power to make and alter by-laws of said company was conferred on the directors thereof, and the stockholders had no power to adopt the [fol. 18] said by-law; (4) because the notice of the meeting at which said by-law is claimed to have been adopted by the shareholders (a) did not specify the officers to whom such profit participation was to be paid; (b) did not specify that the profit participation was to be paid to officers as salary for the year in addition to fixed salaries; and (c) did not state that the profit participation was to be continued beyond the year when adopted.

13. The plaintiff further alleges since the said by-law was adopted or attempted to be adopted by the stockholders, the stockholders have added to the capital of the company over $113,000,000, of which approximately $65,000,000 was contributed from surplus earnings of said company between 1912 and 1931, and $48,822,875 from a subscription by them to 390,583 shares of Common Stock B as of October 1, 1929; that even if valid when adopted the measure of compensation fixed by said by-law is not now equitable or fair; and if applied would result in a total compensation to the respective individual defendants, exclusive of special cash credits and profits from the purchase of the shares of stock at $25 a share heretofore referred to, but including fixed salary, for the year 1930, the last year for which definite figures are available, as follows:

Defendant	Hill, President	$1,010,507.72
"	Penn, Vice-President	603,504.63
"	Mower, Vice-President	555,504.63
"	Neiley, Vice-President	459,495.25
"	Riggio, Vice-President	459,494.25

[fol. 19] If the special credits referred to in paragraph 7 and the reasonable value of the stock allotments referred to in paragraph 8 of this complaint be taken into account, estimating the stock profit at $100 a share, the difference between $25 a share, the price at which it was allotted to the individual defendants by the President and directors

of the company, and $125 a share, its approximate current market price, the total of all compensation paid to and claimed as lawful by the individual defendants for the year 1930 was as follows:

Hill	$2,627,978.48
Penn	1,587,712.75
Mower	746,358.69
Neiley	849,440.77
Riggio	950,349.31

14. In a letter addressd by plaintiff prior to the institution of this suit he made a wrtten demand on the defendant, The American Tobacco Company, to institute action against the individual defendants, among other officers of said company, to require them to account to the company for any excess of salaries or other profit participation paid them over and beyond such amount as the court might find to be reasonable for the years herein included, a copy of which letter is annexed hereto and made a part hereof as Exhibit D; and that thereafter the said company by a letter addressed to plaintiff, a copy of which is annexed hereto as Exhibit E, declined to bring such suit.

[fol. 20] 15. The plaintiff further avers that the various payments made under said by-law XII to the individual defendants herein were never disclosed to the stockholders of the said company by any official or other communication prior to February, 1931, when the plaintiff as a stockholder made an application to the Supreme Court to examine the books of the said company with respect to salaries and other benefits or payments made by said company to its officers, directors and employees, and that prior to said date he had no knowledge thereof.

16. Plaintiff avers (1) that the profit participation paid to the individual defendants under the aforesaid by-law is illegal and void and a waste of corporate assets; (2) that if not illegal, because of the original invalidity of said by-law, that such profit sharing when added to their fixed salaries for the year 1929 and 1930 renders their total compensation exorbitant, excessive, and to the extent that such total compensation exceeds a reasonable and fair salary for the services performed by said individual defendants,

it is a waste of corporate assets to the detriment of this plaintiff and all other stockholders of defendant company; that unless enjoined the defendant company for the current year and all future years will continue to pay to said individual defendants and their successors in office compensation, in addition to their fixed salaries, of 2½% in the case of the President, and 1½% in the case of each of the five Vice-Presidents of all of the profits of the company in excess of $11,369,000 per annum as provided by the terms of said by-law, to the irreparable injury of this plaintiff and all other stockholders of defendant company.

[fol. 21] 17. The amount involved in this suit is more than $3,000, exclusive of costs and interest, and it is not collusive for the purpose of conferring jurisdiction on this Court.

The plaintiff therefore prays (1) that the by-law XII be declared to be illegal, ultra vires and void and not binding on the defendant The American Tobacco Company; (2) that said defendant be enjoined from making any further payments to the individual defendants or their successors in office thereunder; (3) that the individual defendants be required to account for all sums received by them and each of them as herein set forth under and pursuant to said by-law, together with legal interest thereon from the date when received until paid; that if said by-law be held valid, the court fix and determine as an alternative measure of relief the fair and reasonable compensation of each of the individual defendants for each of the years aforesaid, and that each of the said individuals be compelled to account for and pay over to the said The American Tobacco Company the excess of such moneys, profits or benefits actually received by each of the said defendants over such sum as the Court in the case of each of the said defendants may fix as his reasonable compensation as an officer of the said company for each of said years, together with interest thereon; (4) that the said, The American Tobacco Company, its officers, agents and employees be enjoined from thereafter paying to all or any of the said individual defendants or their successors in office any consideration in whatsoever form over and beyond the sums that may be fixed by the Court as reasonable compensation for their [fol. 22] services as officers; (5) that the Court award to

the plaintiff the costs of this action and reasonable counsel fees; (6) and that the Court accord this plaintiff such other and further relief as he, and all other stockholders of said company, may be entitled to.

Richard Reid Rogers, Plaintiff, in sua Persona.
Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.

[fol. 23] EXHIBIT A TO AMENDED COMPLAINT

Copy of Resolution as Passed at Annual Meeting of Stockholders Held March 13, 1912

Mr. J. T. Wilcox proposed the addition of a new Article to the By-Laws as follows:

Article XII

Section 1. As soon as practicable after the end of the year 1912 and of each year of the company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-fourth thereof or 2½ per cent of such amount to the President; one-fifth of the remainder thereof or 1½ per cent of such amount to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of [fol. 24] such vacancy shall be returned into general profit of the company. If there shall be a change during the year

in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes or little cigars, except earnings on preference shares of British American Tobacco Company Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland) Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to ques- [fol. 25] tion the said declaration, or to any examination of the books or accounts of the Company and nothing herein contained shall give any incumbent of any office any right to claim to continue therein or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

Mr. R. J. Boylan seconded such addition to the By-Laws and on being put to a vote such addition to the By-Laws received in its favor the vote of 621,047 shares of stock and the vote of 35 shares of stock was cast against such addition, this vote being made up as follows: All of the Stock represented at the meeting voted in favor of the amend-

ment with the exception of the following which voted against it:

Claudia M. Etting ..... 25 shares Preferred.

and the following which was not voted either for or against:

Lincoln Trust Company Trustee for:

	Com.	Pref.
Julia G. Gayley	50	133
Ruth Alice Halliwell	1,150	
Walter S. Halliwell	1,150	

The Chairman thereupon declared the resolution adopted, and the addition to the By-Laws of Section XII as hereinbefore set out, duly authorized and directed.

[fol. 26] EXHIBIT B TO AMENDED COMPLAINT

Notice of Annual Meeting

No. 110 First Street,
Jersey City, N. Y., February 21, 1912.

Notice is hereby given that the Annual Meeting of the Stockholders of The American Tobacco Company, and an election for Directors thereof, will be held at the office of the Company at 110 First Street, Jersey City, N. J., at eleven o'clock in the forenoon of Wednesday, March 13th.

At this meeting there will be presented for consideration, and action upon, a proposed by-law providing for participation by certain officers of the Company in profits, if any, earned by the Company in excess of profits earned during the year 1910 on the brands and businesses now owned by the Company, not exceeding in the aggregate 10% of such excess.

The preferred and common stock transfer books will be closed from 3 P. M., February 21st, 1912, to 10 A. M., March 14th, 1912.

Josiah T. Wilcox, Secretary.

(If unable to be present at the meeting, kindly sign the enclosed proxy, have your signature witnessed, and return as promptly as possible.)

[fol. 27] EXHIBIT C TO AMENDED COMPLAINT

Agreement and By-Laws

Agreement

An agreement made and entered into this ninth day of September, in the year nineteen hundred and four, between The American Tobacco Company, a corporation of the State of New Jersey, by its directors; Consolidated Tobacco Company, a corporation of said State of New Jersey, by its directors, and Continental Tobacco Company, a corporation of said State of New Jersey, by its directors:

Whereas, the principal and registered office of each of said corporations in the State of New Jersey is at No. 104 First Street, in the City of Jersey City, County of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against each of said corporations may be served within said State; and

Whereas, said The American Tobacco Company was organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof; and the said Consolidated Tobacco Company and Continental Tobacco Company were organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto [fol. 28] and acts amendatory thereof; and all of said Corporations were organized for the purpose of carrying on business of a similar nature, to wit: the manufacture and sale of tobacco and the products thereof; and

Whereas, the respective Boards of Directors of the said corporations deem it advisable, for the purpose of greater efficiency and economy of management as well as for the general welfare of the said corporations, to merge and consolidate them under and pursuant to the provisions of said act entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof;

Now, therefore, in consideration of the premises and of the mutual agreements, covenants, provisions and grants herein contained, it is hereby agreed by and between the said parties hereto, as follows:

Article I. The said The American Tobacco Company, the said Consolidated Tobacco Company, and the said Continental Tobacco Company, are hereby consolidated into a single corporation, under the name of "The American Tobacco Company" (hereinafter called the "merged corporation").

Article II. The said merged corporation, in addition to the powers conferred by Section 1 of the Act Concerning Corporations (Revision of 1896), shall have the powers herein set out, and said merged corporation shall be subject to the limitations on said powers herein set out, to wit: [fol. 29] To dry, and cure, leaf tobacco, and to buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; to construct or otherwise acquire and hold, own, maintain and operate warehouses, factories, offices and other buildings, structures and appliances for the drying, curing, storing, manufacture, sale and distribution of tobacco and its products; to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder, and to indorse or otherwise guarantee the principal and interest, or either, of any bonds, securities or other evidence of indebtedness created by any corporation in which said merged corporation has such an interest, provided that authority for any such indorsement or guaranty be first given by resolution adopted by vote of at least two-thirds of the whole Board of Directors of said merged corporation; to carry on any business operations deemed by said merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; but nothing herein set forth is to be construed to authorize the formation hereby of an insurance, safe deposit or trust company, banking corporation or savings bank or corporation deemed to possess any of the power prohibited to corporations formed under the statutory provisions aforesaid; to conduct business in all States, Territories, Possessions and Dependencies of the United States

of America, and in all foreign countries, and to have one or more offices out of the State of New Jersey, and to hold, [fol. 30] purchase, mortgage and convey real and personal property out of said State as well as therein; the said merged corporation shall have power to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or of any bonds, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other State or government, and to issue its own obligations in payment or in exchange therefor, or for any purpose of its incorporation, and to secure such obligations by pledge or mortgage under deed of trust or otherwise of the shares of capital stock or bonds, securities or other evidences of indebtedness so acquired, or of any property of the corporation. The power to make and alter by-laws of said merged corporation is conferred upon the directors. The directors of said merged corporation may hold their meetings and have an office and keep the books of the corporation (except the stock and transfer books) in the City of New York or elsewhere outside of the State of New Jersey. The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital [fol. 31] stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine, and neither the property so acquired nor any of its capital stock held by the corporation shall be regarded as accumulated profits, for the purpose of declaration or payment of dividends, unless otherwise determined by the directors. In case of any increase in the number of directors of said merged corporation, pursuant to its by-laws, which may provide for such increase by vote of the directors, vacancies in the board shall be deemed to be thereby created which the existing directors shall have the power to fill until the next

election by stockholders, or until successors shall be otherwise chosen. The by-laws of said merged corporation may prescribe the number necessary to constitute a quorum of the directors, which may be less than a majority of the directors. No period is limited for the duration of said corporation, but its existence shall be perpetual.

Article III. The Board of Directors of said merged corporation shall be twenty-eight in number, and the names and places of residence of the first directors and officers thereof, who shall hold office until their successors are chosen or appointed as provided by the by-laws of said merged corporation, are as follows:

[fol. 32] Directors

George Arents	104 First Street, Jersey City, N. J.
Anthony N. Brady	104 First Street, Jersey City, N. J.
Paul Brown	104 First Street, Jersey City, N. J.
John B. Cobb	104 First Street, Jersey City, N. J.
Thomas Dolan	104 First Street, Jersey City, N. J.
Benjamin N. Duke	104 First Street, Jersey City, N. J.
James B. Duke	104 First Street, Jersey City, N. J.
Caleb C. Dula	104 First Street, Jersey City, N. J.
Robert B. Dula	104 First Street, Jersey City, N. J.
Charles E. Halliwell	104 First Street, Jersey City, N. J.
William R. Harris	104 First Street, Jersey City, N. J.
George A. Helme	104 First Street, Jersey City, N. J.
Percival S. Hill	104 First Street, Jersey City, N. J.
Herbert D. Kingsbury	104 First Street, Jersey City, N. J.
Pierre Lorillard	104 First Street, Jersey City, N. J.
Thomas J. Maloney	104 First Street, Jersey City, N. J.
William H. McAlister	104 First Street, Jersey City, N. J.
Rufus L. Patterson	104 First Street, Jersey City, N. J.
Oliver H. Payne	104 First Street, Jersey City, N. J.
Frank H. Ray	104 First Street, Jersey City, N. J.
Thomas F. Ryan	104 First Street, Jersey City, N. J.
Grant B. Schley	104 First Street, Jersey City, N. J.
Robert A. C. Smith	104 First Street, Jersey City, N. J.
Robert K. Smith	104 First Street, Jersey City, N. J.
Charles N. Strotz	104 First Street, Jersey City, N. J.
George W. Watts	104 First Street, Jersey City, N. J.
Harry Weissinger	104 First Street, Jersey City, N. J.
Peter A. B. Widener	104 First Street, Jersey City, N. J.

Officers

President ..... James B. Duke
104 First Street, Jersey City, N. J.

Vice-President ..... John B. Cobb
104 First Street, Jersey City, N. J.

Vice-President ..... Caleb C. Dula
104 First Street, Jersey City, N. J.

Vice-President ..... Charles E. Halliwell
104 First Street, Jersey City, N. J.

Vice-President ..... William R. Harris
104 First Street, Jersey City, N. J.
[fol. 33] Vice-President ..... Percival S. Hill
104 First Street, Jersey City, N. J.
Secretary ..... William H. McAlister
104 First Street, Jersey City, N. J.
Assistant Secretary ..... Josiah T. Wilcox
104 First Street, Jersey City, N. J.
Assistant Secretary ..... Charles K. Faucette
104 First Street, Jersey City, N. J.
Treasurer ..... John M. W. Hicks
104 First Street, Jersey City, N. J.

As Amended January 8, 1912; March 19, 1917; January 7, 1918; September 16, 1920; November 26, 1924; September 3, 1930

Article IV. The capital stock of the said merged Company is $204,010,600. Five Hundred Forty Thousand, One Hundred and Six (540,106) shares shall be Preferred Stock of the par value of $100 each. Two Million (2,000,000) shares shall be Common Stock of the par value of $25 each, and Four Million (4,000,000) shares shall be Common Stock B of the par value of $25 each. The rights of the holders of the said Preferred Stock, Common Stock and Common Stock B, respectively, shall be as follows: The holders of the Preferred Stock shall be entitled to four votes for each share of the par value of $100 held by them, and the holders of the Common Stock shall be entitled to one vote for each share of the par value of $25 held by them, but the holders of Common Stock B shall be entitled to no voting rights. The holders of the Preferred Stock shall be entitled to receive out of the surplus or out of the net profits, and the merged corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of, but never exceeding, six per centum per annum, cumulative, from and after the 1st day of October, 1904, payable yearly, half yearly, or quarterly, [fol. 34] before any dividend shall be set apart or paid on the Common Stock or Common Stock B; provided, however, that when all accrued dividends on the Preferred Stock have been paid, the Directors shall, if in their judgment the surplus or the net profits, after deducting the

amount of dividends to accrue on the Preferred Stock during the current year, shall be sufficient for such purpose, have power in their discretion to declare and pay a dividend, or dividends, on the Common Stock and Common Stock B. The Common Stock and Common Stock B, with respect to each share of either outstanding, shall have equal rights in the matter of dividends. In case of liquidation, or dissolution, or distribution of assets of the said merged corporation, the holders of Preferred Stock shall be paid the par amount of their Preferred shares and the amount of dividends accumulated and unpaid before any amount shall be payable or paid to the holders of the Common Stock or the Common Stock B; the balance of the assets of said merged corporation shall be divided ratably among the holders of the Common Stock and the Common Stock B, share and share alike, without distinction between shares of the Common Stock and the Common Stock B.

Article V. The said corporations are merged and consolidated upon the understanding and agreement that the present indebtedness of each of said corporations shall be assumed in full by the said merged corporation.

Article VI. All property, real, personal and mixed, of the said corporations, parties hereto, shall vest in the said [fol. 35] merged corporation immediately upon the adoption of this agreement by the stockholders of the said corporation, as provided by the provisions of the said act entitled "An Act Concerning Corporations (Revision of 1896)" and the several supplements thereto and acts amendatory thereof; but if the said merged corporation shall deem or be advised that any further assignments, assurances in the law, or things are necessary or desirable to vest the title to such property in the said merged corporation, the said corporations parties hereto shall execute and do all such assignments, assurances in the law, and things necessary to vest title to such property in said merged corporation, and otherwise to carry out the purposes of this agreement.

Article VII. The capital stock of each of the said corporations parties hereto shall be converted into the common stock, the preferred stock or the obligations of said merged corporation, and the common stock, preferred stock and obligations of said merged corporation shall be apportioned

among the stockholders of the said corporations, parties hereto, according to the shares held by the respective stockholders of said corporations, and shall be delivered to them upon the surrender of their certificates of stock, as follows:

There shall be apportioned to each of the holders of the eight per cent preferred non-cumulative stock of the said The American Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of the said merged corporation of one hundred and thirty-three dollars, thirty-three [fol. 36] and one-third cents ($133.33⅓) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation in the City of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable to the holder of such bond or obligation, or to the holder of a coupon representing such interest, at said office or agency in like gold coin, semi-annually on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall along with the bonds provided for in the next paragraph hereof constitute a first charge upon the income and property of the merged corporation. There shall also be paid to the holders of said preferred stock of said The American Tobacco Company, party hereto, in lieu of dividend, an amount in cash equal to two dollars for each share of said preferred stock held by him.

There shall be apportioned to each of the holders of the seven per cent non-cumulative preferred stock of said Continental Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of said merged corporation for one hundred and sixteen dollars, sixty-six and two thirds cents ($116.66⅔) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation, in the City of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable [fol. 37] to the holder of such bond or obligation, or to the holder of a coupon representing such interest, at said office

or agency in like gold coin, semi-annually, on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall, along with the bonds provided for in the next preceding paragraph, constitute a first charge upon the income and property of the merged corporation. The holders of the said preferred stock of said Continental Tobacco Company, party hereto, shall also be entitled to receive and enjoy the dividend of one and three-quarters (1¾%) per centum already declared on said preferred stock payable October 3, 1904.

There shall be apportioned to each of the holders of the common stock of said The American Tobacco Company, party hereto, for each two shares of said common stock of the par value of $50 each held by him, one share of the common stock of said merged corporation.

There shall be apportioned to each of the holders of the common stock of said Continental Tobacco Company, party hereto, for each share of said common stock of the par value of $100 held by him, one share of the common stock of the said merged corporation.

There shall be apportioned to each holder of the stock of said Consolidated Tobacco Company, party hereto, for each share of said stock of the par value of $100 held by him, one share of the common stock of said merged corporation.

By the act of merger the stocks of all the companies parties hereto held by any of the companies parties hereto shall stand and be canceled.

[fol. 38] The preferred stock of the merged corporation herein provided for, may be issued for the redemption and retirement at par of debts that by the act of merger become the debts of said merged corporation, and such preferred stock shall be issued only for such redemption or at par for cash to be used in such redemption.

Article VIII. The Morton Trust Company of the City of New York is hereby appointed the Transfer Agent of the stock and obligations of the said merged corporation in the City of New York, and the Farmers' Loan and Trust Company, of the City of New York, is hereby appointed Registrar of the stock of said merged corporation; and any stockholder of any of the said corporations parties hereto, upon presenting to the said Transfer Agent his certificate of

stock and surrendering the same to be canceled, shall be entitled to receive a certificate for the proper number of shares of the capital stock of said merged corporation, or to the bond or obligation of said merged corporation, pursuant to Article VII of this agreement.

Article IX. The said merged corporation shall pay all expenses of consolidation and all preliminary expenses, including legal expenses.

Article X. The principal and registered office of said merged corporation in the State of New Jersey is at No. 104 First Street, City of Jersey City, County of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against said merged corporation within the State of New Jersey may be served.

[fol. 39] In witness whereof the said parties to this agreement have in pursuance of a resolution passed by the Board of Directors of each of the said corporations, at a regular meeting of the Board of Directors of each of said corporations, at which a quorum was present, caused the respective corporate seals of said corporations to be hereto affixed and these presents to be signed by their respective Presidents or First Vice-Presidents and attested by their respective Secretaries all duly authorized thereto, the day and year first above written.

The American Tobacco Company, by Percival S. Hill, First Vice-President. Attest: Charles N. Strotz, Secretary. (Seal.) Consolidated Tobacco Company, by James B. Duke, President. Attest: Charles S. Keene, Secretary. (Seal.) Continental Tobacco Company, by Charles E. Halliwell, First Vice-President. Attest: William H. McAlister, Secretary. (Seal.)

[fol. 40] State of New Jersey,
County of Hudson, ss:

I, Charles N. Strotz, Secretary of The American Tobacco Company, a corporation organized and doing business pursuant to the provisions of an act of the legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof; do hereby

certify in accordance with the provisions of Section 105 of "An Act Concerning Corporations (Revision of 1896)":

1. That the foregoing agreements for the merger and consolidation of said corporation and the Continental Tobacco Company and Consolidated Tobacco Company was made by the directors of said The American Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said The American Tobacco Company at a meeting thereof held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting, and a note of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds [fol. 41] of the shares of the capital stock of said The American Tobacco Company voted in favor of the adoption of said agreement.

4. That the meeting of stockholders of The American Tobacco Company and the said vote by ballot upon the adoption of said agreement, were held and taken separately from the meetings of stockholders and votes of the said Continental Tobacco Company and Consolidated Tobacco Company.

5. That the principal office of said The American Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

In witness whereof I have hereunto signed my name as Secretary, and affixed the seal of the said The American Tobacco Company, this 19th day of October, 1904.

Charles N. Strotz, Secretary. (Seal.)

[fol. 42] State of New Jersey,
County of Hudson, ss:

I, Charles S. Keene, Secretary of Consolidated Tobacco Company, a corporation organized and doing business pur-

suant to an act of the legislature of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," do hereby certify in accordance with the provisions of Section 105 of said act:

1. That the foregoing agreement for the merger and consolidation of said corporation and The American Tobacco Company and the Continental Tobacco Company was made by the directors of said Consolidated Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said Consolidated Tobacco Company at a meeting thereof held October 17, 1904, the same being an adjourned meeting of a meeting held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said shareholders.

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said Consolidated Tobacco Company voted in favor of the adoption of said agreement.

[fol. 43] 4. That the meeting of stockholders of Consolidated Tobacco Company and the said vote by ballot upon the adoption of said agreement were held and taken separately from the meetings of stockholders and votes of the said Continental Tobacco Company and The American Tobacco Company.

5. That the principal office of said Consolidated Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

In witness whereof I have hereunto signed my name as Secretary, and affixed the seal of the said Consolidated Tobacco Company, this 19th day of October, 1904.

Charles S. Keene, Secretary. (Seal.)

[fol. 44] STATE OF NEW JERSEY,
County of Hudson, ss:

I, William H. McAlister, Secretary of Continental Tobacco Company, a corporation organized and doing business pursuant to an act of the legislature of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," do hereby certify, in accordance with the provisions of Section 105 of said act:

1. That the foregoing agreement for the merger and consolidation of said corporation and The American Tobacco Company and Consolidated Tobacco Company was made by the directors of said Continental Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said Continental Tobacco Company at a meeting thereof held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said Continental To-
[fol. 45] bacco Company, voted in favor of the adoption of said agreement.

4. That the meeting of stockholders of Continental Tobacco Company and the said vote by ballot upon the adoption of said agreement were held and taken separately from the meetings of stockholders and votes of the said Consolidated Tobacco Company and The American Tobacco Company.

5. That the principal office of said Continental Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

In witness whereof I have hereunto signed my name as Secretary and affixed the seal of the said Continental Tobacco Company, this 19th day of October, 1904.

William H. McAlister, Secretary. (Seal.)

Endorsed

"Filed and Recorded, Oct. 19, 1904.

S. D. Dickinson, Secretary of State.

[fol. 46] State of New Jersey, Department of State

I, S. D. Dickinson, Secretary of the State of New Jersey, do hereby certify that the foregoing is a true copy of Agreement of Merger and Consolidation between The American Tobacco Company, Consolidated Tobacco Company, and the Continental Tobacco Company, as the same is taken from and compared with the original, filed October 19, 1904, and now remaining on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed my Official Seal at Trenton, this Twenty-sixth day of October, A. D. 1904.

S. D. Dickinson, Secretary of State." (Seal.)

[fol. 47] By-Laws of the American Tobacco Company, Adopted Oct. 20, 1904, with all Amendments up to December 31, 1930

Article I

Directors

Section 1. The number of the directors of this Company is fixed at seventeen, who shall be annually elected and shall hold office until the next following annual meeting of stockholders, or until their successors are duly elected and qualified.

Section 2. The number of the directors may be altered at any time by vote of a majority of the directors at any regular or special meeting.

Section 3. A stockholder need not hold more than one share of the stock of the corporation to qualify him to be a director.

Section 4. Vacancies among the directors shall be filled by vote of the remaining directors at any regular or special meeting of the Board.

Section 5. The directors may hold their meetings and have an office and keep the books of the corporation (ex-
[fol. 48] cept the stock and transfer books) in the City of New York, or elsewhere outside of the State of New Jersey.

Section 6. If for any reason the Guaranty Trust Company of New York, of the City of New York, should cease to be transfer agent of the stock and obligations of the corporation, or The Farmers' Loan & Trust Company, of the City of New York, the registrar of the stock of the corporation, or if for any reason it shall be desired to make a change as to either or both, the directors may appoint another as transfer agent in the room and stead of the Guaranty Trust Company of New York, and another as registrar in the room and stead of The Farmers' Loan & Trust Company, as the case may be.

Article II

Meetings of Stockholders

Section 1. The annual meeting of the stockholders of the corporation for the election of directors, and such other business as may properly come before the meeting, shall be held at the principal office of the Company in Jersey City, on the first Wednesday of April, at eleven o'clock in the forenoon, or at such hour as the directors shall appoint before notice of the meeting is given.

Section 2. Special meetings of the stockholders, to be held at the principal office of the Company in New Jersey, may be called by the directors for such purpose as shall be specified by resolution.

[fol. 49] Section 3. Due notice of each annual meeting of the stockholders shall be given by a written or printed notice signed by the Secretary of the Company and mailed, postage prepaid, at least twenty days prior to such meeting, to each stockholder of record entitled to vote thereat, appearing on the books of the Company at the address given thereon, and public notice of the time and place of

holding such meeting shall be published not less than once a week for two successive weeks previous thereto in a daily newspaper of general circulation, published in the City of New York.

Due notice of each special meeting shall be given also in the manner above provided. The notice shall state the object of the special meeting, and no other business shall be transacted at such meeting; but this provision shall not apply to annual meetings, at which any business may be transacted without notice of the object of such annual meeting.

Section 4. The President of the corporation, if present, shall call to order, and preside at, all meetings of the stockholders, whether general or special, and the Secretary of the corporation (or in his absence any Assistant Secretary) shall be the Secretary of such meeting; if the President is absent, any Vice-President shall preside. If the President and all the Vice-Presidents are absent, the meeting shall be presided over by the person designated in writing by the President, or any one of the Vice-Presidents. If the President and all the Vice Presidents are absent, and no one designated by the President or any of the Vice-Presidents is present, the meeting may call any stockholder [fol. 50] of record who is entitled to vote for directors, or any person present holding a proxy for such stockholder, to preside. In the absence of the Secretary and Assistant Secretaries, any person may be selected by the meeting to act as Secretary of the meeting.

Section 5. Any voting proxy given by a stockholder must be in writing, signed by the stockholder.

Section 6. Less than a quorum of the stockholders may adjourn any stockholders' meeting.

Section 7. The directors may appoint two inspectors of the annual election at any time before notice of the meeting at which such election is held.

Article III

Meetings of Directors

Section 1. Regular meetings of the directors shall be held at the office of the Company in the City of New York,

on Wednesday of each week. Meetings shall be held at eleven o'clock in the forenoon, except that meetings on the last Wednesday of each month shall be held at four fifteen o'clock in the afternoon. Special meetings may be held as determined by the directors, and may be called by the President at any time and shall be called by him on the request of three directors.

Section 2. No notice need be given of regular meetings of the directors. Reasonable notice shall be given of special meetings; but notice of a meeting may be admitted or waived by all the directors.

[fol. 51] Section 3. At any meeting five directors shall constitute a quorum.

Article IV

Officers

Section 1. The directors shall annually choose from their own number a President and not more than five Vice-Presidents, and shall annually choose a Secretary and a Treasurer, who need not be directors.

Section 2. The directors may elect a Comptroller, an Auditor and other officers and define their powers and duties.

Section 3. Any two offices not inconsistent with each other may be held by the same person.

Section 4. All officers elected by the directors shall hold office, subject to removal by the directors, until their successors are chosen and qualified.

Section 5. All agents and employees shall be appointed and may be removed by the President, subject to the control of the directors.

Section 6. Vacancies among officers of the corporation shall be filled as soon as practicable by vote of the directors at any regular or special meeting.

Section 7. The President, if present, shall preside at the meetings of directors, and shall have the management of

[fol. 52] the Company's affairs, subject to the control of the directors.

Section 8. The Vice-Presidents shall have such powers and perform such duties as shall at any time be delegated to them by the directors, and in the absence or disability of the President, one of them shall perform the duties of his office, subject to the control of the directors.

Section 9. The Secretary shall give the requisite notice of meetings of stockholders and directors, and shall record the proceedings of such meetings, and besides his powers and duties prescribed by law, shall have such other powers and perform such other duties as shall at any time be required of him by the directors.

Section 10. The Secretary shall have the custody of the seal of the corporation and of the books and papers, except those pertaining to the office of Treasurer.

Section 11. The Assistant Secretaries shall assist the Secretary in the discharge of his duties and shall have such powers and perform such other duties as shall at any time be delegated to them by the directors, and in the absence or disability of the Secretary, shall perform the duties of his office, subject to the control of the directors.

Section 12. The Treasurer shall have charge of the funds and securities of the corporation, and shall keep and deposit the same as required by the directors, and shall keep proper books of account of all receipts and disbursements [fol. 53] and official transactions of the corporation, and shall render statements of his accounts as required by the President or the Directors.

Section 13. The Treasurer shall give a bond in such sum and with such surety or sureties as shall be required by the directors for the faithful discharge of his duties.

Section 14. The Assistant Treasurer shall assist the Treasurer in the discharge of his duties and shall have such powers and perform such other duties as shall at any time be delegated to him by the Directors; and in the absence or disability of the Treasurer, shall perform the duties of his office subject to the control of the directors.

Section 15. Any other officer, agent or employee of the corporation may be required to give such security for the faithful performance of his duties as shall be determined by the directors, who shall also determine the custody of any security given.

Article V

Salaries

Section 1. The salaries of all officers elected by the directors shall be fixed by the directors.

Section 2. Salaries of all other agents and employees shall be fixed by the President, subject to the control of the directors.

[fol. 54]

Article VI

Seal

Section 1. The seal of the corporation shall be used and attested only as directed by the President or by the directors.

Article VII

Payments

Section 1. All claims against the corporation shall, so far as practicable, be paid by checks drawn or indorsed to the order of the person having the claim.

Section 2. All checks or bank drafts shall be signed by any two of the following named officers: President, any Vice-President, Secretary, any Assistant Secretary, Treasurer, Assistant Treasurer; and in such other manner as the Directors may from time to time designate.

Section 3. All notes or other obligations and contracts shall be signed by the President, or a Vice-President and the Secretary, or an Assistant Secretary, or the Treasurer, or an Assistant Treasurer.

Article VIII

Capital Stock

Section 1. Certificates of the capital stock of the corporation shall be issued for one or more full shares duly num-

[fol. 55] bered and registered in the order of their issue and shall be in the form the directors shall prescribe.

Section 2. The capital stock shall be transferable on the transfer books of the corporation, subject to these By-Laws, by the owner in person, or by attorney or legal representative, written evidence of whose authority shall be filed with the corporation.

Section 3. No transfer of capital stock can be required except upon surrender and cancellation of the certificate representing the same.

Section 4. The Board of Directors shall have power to close the stock transfer books for a period not exceeding twenty days, preceding the date of any meeting of the stockholders or at other times and for other purposes; or in lieu of closing the transfer books, the Board of Directors may fix in advance a date, not exceeding twenty days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, or entitled to receive payment of any such dividend or any such allotment of rights, or to exercise the rights in respect to any such change, conversion or exchange of capital stock; and in such case stockholders of record on the date so fixed shall be exclusively entitled to such notice of and vote at such [fol. 56] meeting or at any adjournment thereof, or to receive payment of such dividend or allotment of rights, or exercise such rights, as the case may be, and not withstanding any transfer of any stock on the books of this Company after any such record date fixed as aforesaid.

Article IX

Penalties

Section 1. No director or officer of this Company shall, during his term of office, engage directly or indirectly in any business similar to that in which this Company is or is to be engaged, or in the manufacture or sale of any supplies for or connected therewith, without the consent of two-thirds of the directors of the Company.

Any violation of this provision shall be treated by the Board of Directors, after notice to the offender, as a vacation of his office, and his successor shall be thereupon duly elected; and the offender shall, in addition, be subject to a penalty of twenty dollars, and to such damages as can be legally collected.

Article X

Dividends

Section 1. Dividends upon the six per cent cumulative preferred stock of the Company, payable out of the accumulated profits of the Company in excess of such sum, if [fol. 57] any, as shall have been reserved as a working capital, shall be declared by the directors so as to be payable on the first business day of January, April, July and October in each and every year, such declaration to be at least fifteen days before the time of payment. When all accrued dividends on the preferred stock have been paid, the directors shall, if in their judgment the surplus or net profits in excess of such sum as shall have been reserved as a working capital, and after deducting the amount of dividends accrued or accruing on the preferred stock during the current year, shall be sufficient for such purpose, have power to declare so as to be payable on the first business day of March, June, September and December in each and every year, a dividend on the common stock and common stock B of the Company, such declaration to be at least fifteen days before the time of payment; and the directors may declare such dividends at other times, and payable at other times, upon the conditions just hereinbefore provided.

Article XI

Amendments

Section 1. These By-Laws may be added to, altered, repealed or suspended at any regular or special meeting by a majority vote, at which not less than one-third of all the directors are present.

Article XII

Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations

[fol. 58] thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent of such amount, to the President; one-fifth of the remainder thereof or 1½ per cent of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of such vacancy shall be returned into the general profit account of the Company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manu-[fol. 59] facturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted, as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Company, Lim-

ited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due any-one hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company, and nothing herein contained shall give any incumbent of any office any right to claim to continue therein, or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

[fol. 60] EXHIBIT D TO AMENDED COMPLAINT

March 12, 1931.

DEAR SIRS: I am now advised that under By-law XII, said to have been adopted by the stockholders in 1912, a sum equal to 10% of the net earnings of The American Tobacco Company for the year 1910 and dividends on the preferred stock, has been paid to the President and five Vice-Presidents of the company for such year since 1912 under the guise of additional salary for such year, in addition to their fixed salaries, in the following proportions: 2½% to the President, and 1½% to each of the Vice-Presidents.

From a statement of the net earnings of the company for the years from 1926 to 1930, inclusive, contained in an affidavit of your Vice-President, Mr. Charles F. Neiley, I gather that this distribution during the past seven years alone has exceeded the sum of $10,700,000.

Inasmuch as these payments were exorbitant and illegal in whole or in part, I demand that within ten days you institute suit against the officers who have received these bonuses since the year 1912, or their estates, requiring them to account for the benefit of the company and its stockholders for all or such part thereof as the Court may hold to be illegal.

If I do not hear from you within the time mentioned, I shall assume that you refuse to comply with this demand.

Very truly yours, Richard Reid Rogers.

The American Tobacco Company, 111 Fifth Avenue, New York, N. Y.

[fol. 61] EXHIBIT E TO AMENDED COMPLAINT

The American Tobacco Company, Incorporated, 111 Fifth Avenue, New York

Office of the Secretary

March 19, 1931.

Mr. Richard Reid Rogers, 74 Trinity Place, New York, N. Y.

DEAR SIR: We beg to acknowledge your letter dated March 2, 1931, left at the New York office of this Company on March 13, 1913.

The advice which you say that you have that under By-law XII, "a sum equal to 10% of the net earnings of The American Tobacco Company for the year 1910 and dividends on the preferred stock, has been paid to the President and five Vice-Presidents of the Company for each year since 1912 under the guise of additional salary for such year, in addition to their fixed salaries in the following proportions: 2½% to the President, and 1½% to each of the Vice-Presidents," is erroneous.

The language of Article XII of the by-laws is as follows:

"Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the [fol. 62] sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-

fourth thereof or 2½ per cent of such amount to the President; one-fifth of the remainder thereof, or 1½ per cent of such amount to each of the five Vice-Presidents as salary for the year in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of such vacancy shall be returned into the general profit of the Company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,-[fol. 63] 459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted as the case may be, the company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes or little cigars, except earning on preference shares of British American Tobacco Company Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland) Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company and nothing herein contained shall give any incumbent of any office any right to claim to

continue therein, or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the Directors."

The records of this Company show that Article XII of the by-laws was duly adopted at a stockholders' meeting held on March 13, 1912, the vote in its favor being 621,047 shares and the vote against 35 shares, the outstanding stock of the Company at that time consisting of 949,427 shares of which 402,424 shares were shares of common stock of the par value of $100 each and 543,003 shares were shares of preferred stock of the par value of $100 each.

[fol. 64] On March 11, 1931, there was mailed to you as a stockholder a statement relative to the Employees' Stock Subscription Plan as authorized at the special meeting of Stockholders of this Company held on July 28, 1930. On page 9 of that statement will be found information relative to the above by-law. It will be noted that the 10% attached only to net profits in excess of the sum of $8,222,245.82, and in determining the net earnings there had to be deducted, among other items, an amount equal to 6% dividends on $52,459,400 of the Company 6% preferred stock, also that this Company ordinarily has income from sources other than those included in the by-law but income from such other sources is excluded and compensation under the by-law is based only upon the profits from sources included in language of the By-Law.

Your letter asserts that payments under the by-law which you characterize as bonuses were exorbitant and illegal in whole or in part and demands that within ten days the Company institute suit against the officers who received the same since the year 1912, or their estates, requiring them to account for the benefit of the Company and its stockholders for all or a part thereof as the court may hold to be illegal.

We find nothing in your letter nor in the facts as known to the Company to justify the assertions which you make. On the contrary, the payments referred to have been made under express authority of the by-law duly adopted by the

stockholders, and we are advised that the institution of a suit such as you have demanded in your letter would be without basis in law or in fact, and we therefore decline to institute suit in accordance with your demand.

Very truly yours, (Sgd.) Richard J. Boylan, Secretary.

[fol. 65] IN UNITED STATES DISTRICT COURT

E-60-94

[Title omitted]

Consolidated Cause

ANSWER OF DEFENDANTS HILL, NEILEY, RIGGIO, TAYLOR, AND THE AMERICAN TOBACCO COMPANY TO AMENDED COMPLAINT

The defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, for their answer to the amended complaint, show,

I. They admit that plaintiff was a stockholder of record of 200 shares of the Common Stock and 400 shares of the Common Stock B of The American Tobacco Company (hereinafter called the "Company") at the time of the commencement of this action, but allege that they are without knowledge as to whether he is the owner of said 200 shares [fol. 66] of the Common Stock and 400 shares of the Common Stock B of the Company, and that the 200 shares of the present Common Stock of which plaintiff is now the holder of record represent 50 shares of $100 par value Common Stock of which plaintiff was the holder of record on October 6, 1917, and they therefore deny that he was a stockholder of record of said 200 shares of the Common Stock of the Company in 1916.

II. They admit the allegations of paragraph 2 of the amended complaint.

III. They admit the allegations of paragraph 3 of the amended complaint.

IV. They admit the allegations of paragraph 4 of the amended complaint.

V. They admit that defendant Hill is a resident of New York, and from April 6, 1921 to date has been a Director of the Company, from April 6, 1921 to December 16, 1925, was a Vice-President, and from December 16, 1925 to date, President of the Company. They deny that defendant Mower is a resident of New York and allege that he is a resident of London, England, and admit he was a Director of the Company from April 6, 1921 to July 31, 1931, and one of its Vice-Presidents from April 4, 1931 to July 31, 1931, on which date he resigned both offices. They admit that Charles A. Penn was a resident of North Carolina until his death on October 22, 1931, and that he was a Director and [fol. 67] a Vice-President of the Company from April 6, 1921 to that date.

VI. They admit the allegations of paragraph 6 of the amended complaint.

VII. Answering paragraph 7, they allege that the credits therein described were for additional compensation for services rendered to the Company by the persons therein named; that such payment was within the power of the Board of Directors, who had exercised their discretion in good faith and for the best interests of the Company and its stockholders; that the compensation so paid tended to increase the efficiency, loyalty, faithfulness, activity and energy of those officers in the conduct of the business of the Company, and the services so obtained thereby resulted in a profit to the Company for the year 1930 and a distribution to stockholders for the year 1930 far exceeding that which had taken place in any previous year; that the moneys so paid together with all other compensation were not equal to the value of the services that were rendered to the Company by those persons during the period for which said compensation was paid, and that, as a result of the policy so pursued by the Directors of the Company, the payments of compensation so made have resulted in increasing the amount of the Company's business, the amount of the Company's profits, the amount of distribution to the Company's stockholders, the amount of its reserve and surplus during [fol. 68] a period when most of the corporations in the United States were meeting with decreased business, decreased profits, decreased payments to their stockholders and decreased surpluses.

VIII. Answering paragraph 8 of the amended complaint, they allege that the Employees' Stock Subscription Plan (hereinafter called the "Plan") was duly authorized by the stockholders of the Company at a meeting held on July 28, 1930, by a vote of 389,553 shares of Preferred Stock, 620,086 shares of the old Common Stock ($50 par value), and 1,218,849 shares of the old Common Stock B ($50 par value), on which date there were outstanding entitled to vote 526,997 shares of the Preferred Stock, 778,548 shares of the old Common Stock ($50 par value), and 1,535,850 shares of the old Common Stock B ($50 par value) and only 170 Common and 1,995 Common B shares and 10 Preferred shares voted against said resolution; that said Plan was duly authorized pursuant to the provisions of §§158 and 158a of the General Corporation Act of New Jersey as well as under the other laws of the State of New Jersey; that said Plan was in all respects legal and valid, and that the allotments of stock made thereunder were reasonable and proper and that such benefit therein provided together with all other compensation did not equal the value of the services rendered during the period for which the compensation was paid; that said Plan could have been and can be repealed at any time pursuant to the provisions of §158c of [fol. 69] the General Corporation Act of New Jersey; that by virtue of §46 of the General Corporation Act of New Jersey the plaintiff, if joined by any two stockholders, could have called a meeting for such purpose, but no such meeting has ever been called; that the stockholders of the Company were fully apprised prior to the annual meeting which was held on April 1, 1931, of the allotments under the Plan, to wit, on or about March 12, 1931, there was mailed to each stockholder of record a pamphlet relative to the Plan; that on April 1, 1931, the voting stockholders of more than 99% of the stock then present or represented approved the management and re-elected all the Directors.

IX. They admit the amounts set forth in paragraph 9 of the amended complaint were received, but they allege that said payments were for compensation duly earned by the persons therein described, as more fully detailed hereinafter.

X. Answering paragraph 10 of the amended complaint, they allege that Article XII of the By-Laws was duly

adopted by the stockholders of the Company on March 13, 1912; that said By-Law was duly adopted more than five years before plaintiff became a stockholder of record of the Company of any of the shares of its Common Stock of which he is now the holder of record.

XI. Answering paragraph 11 of the amended complaint, they allege that only the following defendants are now eligible to the contingent compensation provided by said [fol. 70] Article XII of the By-Laws for the year 1931, viz.: defendants Hill, Neiley and Riggio, and that the defendant Mower will be entitled to only so much of the said contingent compensation as the proportion of his service with the Company for the year 1931 bears to the whole year and that the late defendant Penn will be entitled only to such portion of the contingent compensation as the period from January 1, 1931 to the date of his death bears to the whole year.

They deny that the profits payable under By-Law Article XII for the year 1931 will exceed $5,000,000 and that such amount unless enjoined will be paid shortly after the close of the present year by the Company to its President and Vice Presidents, but they allege that the Company will pay to the defendants herein named the amount of the contingent compensation to which they are entitled in accordance with the provision of Article XII in the case of the defendant Hill and so much of the contingent compensation that the defendants Neiley and Riggio are entitled to in accordance with said By-Law and a waiver by said defendants authorizing the Company to deduct the sum of $14,692,871.24 instead of the sum of $8,222,245.82 from the net income for the year 1931 and that said payments all together will not exceed $3,000,000.

They deny that the Company's profits are running at the rate of $60,000,000 a year but allege that the volume and profits of the Company's business for the first ten months [fol. 71] of the year 1931 are greater than for the corresponding period of the year 1930 and that such increase in business and profits was due in a large measure to the efforts, ability and services rendered by the defendants as hereinafter more fully detailed.

XII. They deny each and every allegation set forth in paragraph 12 of the amended complaint; they deny that the

by-law Article XII under which the contingent compensation was paid and may hereafter be paid was or is illegal, ultra vires or void for any of the reasons set forth in paragraph 12 of the amended complaint or for any other reason whatsoever; and they allege that the moneys so paid and to be paid are by way of compensation for services rendered, that such compensation was and is and will be a legitimate expense of the operations of the Company, and in response to subdivision (1) of Paragraph 12 that there is nothing in the charter of the Company that prohibits the Company from paying to said officers said contingent compensation in accordance with said By-Law Article XII and they deny that any of said payments constitute in any manner a diversion of the profits, surplus or earnings of the Company; that in response to subdivision (2) of Paragraph 12 they allege that there is nothing in the General Corporation Laws of New Jersey or any of the laws of New Jersey that prohibits at any time the payment of compensation to officers or employees of a New Jersey corporation based upon a contingent participation in the profits of the Company and that § 158c of the General Cor- [fol. 72] poration Act of New Jersey (Chapter 175 of the Laws of 1920) provides that:

"The privileges and powers conferred by this Act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this State."

In response to subdivision (3) of Paragraph 12 they deny that the stockholders had no power to adopt said By-Law and they allege that under New Jersey law stockholders of a corporation have the right at all times to make or amend or repeal any By-Law of the Company; that the charter merely provides that

"The power to make and alter by-laws of said merged corporations is conferred upon the directors"

and did not exclude by its terms the power or right of the stockholders of the Company to make or amend by-laws.

In response to subdivision (4) of paragraph 12 they allege that the notice to stockholders of the meeting at which

said By-Law was so duly adopted by the stockholders of the Company was sufficient and complete and they allege that the notice upon its face showed that the profit participation was to continue beyond the year 1912, the year in which said By-Law was adopted.

[fol. 73] XIII. Answering paragraph 13 of the amended complaint, they deny that the measure of compensation fixed by Article XII of the By-Laws is not now equitable or fair and allege on the contrary that said measure of compensation is fair and equitable; they allege further that the stockholders could have at any time by a majority vote modified or repealed said By-Law and that a meeting for that purpose could have been called and can now be called by any three stockholders of the Company and that no such meeting has been at any time called; they deny that in determining the total compensation to be paid to the defendants the allotments of stock referred to in said paragraph 13 should be considered, because said stock was not allotted until 1931, and that title thereto cannot pass in any event until December 31, 1931, and that the difference between the market value at the time said allotment was made and the subscription price is not a measure of compensation, nor is it any proof of what the market value of said stock will be at the time that the participants are entitled to delivery of said stock, nor is the difference between the market value and the subscription price a measure of the compensation so paid to such participants. They allege that in any event the compensation, including any benefits that were or may be received under the Employees Stock Subscription Plan, did not equal the value of the services rendered by the defendants, as more fully detailed hereinafter.

[fol. 74] XIV. Answering paragraph 15 of the amended complaint, they allege that plaintiff, who became a stockholder of the Company five years after Article XII of the By-Laws was adopted by the stockholders, was bound by the provisions of that By-Law and is conclusively presumed to have knowledge thereof; that all of the stockholders of the Company could have ascertained from the annual reports submitted to them by the Company the maximum amount of compensation that could have been paid to the President and five Vice-Presidents of the Company by the

application of the formula provided for by Article XII of the By-Laws of the Company; that no statements were sent to stockholders of the amount of compensation paid to the employees of the Company, because the Directors, in their discretion, did not deem it for the best interest of the Company to advise its competitors of the amounts being paid to the different important men in the Company, because the tobacco industry is a highly competitive field in which any information affecting any company in the industry is sought by all the large corporations engaged therein; that the Directors of the Company in their discretion did not deem it advantageous to the successful operation of the Company to apprise the employees of the compensation that was being paid to the said officers, as such information would tend to make the employees dissatisfied and jealous of one another and thereby destroy the morale which the Directors were trying to maintain, which morale was essential to obtain the greatest benefit for the Company and its stockholders.

[fol. 75] XV. They allege that defendant Taylor has not been paid any compensation under Article XII of the By-Laws. They deny that the total compensation paid to the individual defendants under Article XII is illegal and void and a waste of corporate assets but allege that said compensation was legal and was a proper expenditure by the Company for the services rendered by the recipients thereof pursuant to and by virtue of the authority of the stockholders declared in the resolution of March 13, 1912; they deny that the compensations paid to the defendants for the years 1929 and 1930 were exorbitant and excessive and that they exceeded a reasonable and fair salary for the services performed by said individual defendants but allege that the services rendered by those defendants as will be hereinafter set forth were worth more to the Company than the compensation so paid to them; they deny that such total compensation is a waste of corporate assets and they deny that any payments that may be made in the future by way of compensation pursuant to the provisions of the By-Law will constitute irreparable injury to the plaintiff or any other stockholders of the Company and they allege as a result of the policy so authorized by the stockholders of the Company, the payments of compensation so made to the allottees have resulted in those allottees taking an in-

terest in the Company, its affairs and its welfare, and such payments have succeeded in increasing the amount of the Company's business, the amount of the Company's profits, the amount of distribution to the Company's stockholders, [fol. 76] the amount of its reserve and surplus during a period when most of the corporations in the United States were meeting with decreased business, decreased profits, decreased payments to their stockholders and decreased surpluses.

As a first separate defense defendants allege that

XVI. Article XII of the By-Laws of the Company was duly adopted by the stockholders of the Company at a meeting of the stockholders held on March 13, 1912, which By-Law was duly adopted by a vote in its favor of 621,047 shares and the vote against its adoption was 35 shares, the outstanding stock of the Company at that time consisting of 945,427 shares, of which 402,424 shares were Common Stock of the par value of $100 each and 543,003 shares were Preferred Stock of the par value of $100 each.

XVII. Said By-Law was duly adopted more than five years before plaintiff became a stockholder of record of the Company of any shares of its Common Stock of which he is now the holder of record.

XVIII. Said By-Law by its very provisions provided that it could be repealed by the action of the stockholders of the Company.

XIX. Plaintiff possessed the right at all times and still possesses the right, pursuant to the provisions of § 46 of [fol. 77] the General Corporation Act of the State of New Jersey (Laws of 1896, Chap. 185, § 46 thereof), to call a meeting to repeal that By-Law (provided he is joined by two other stockholders) by publishing ten days' notice of the time, place and purposes of the meeting, in a newspaper published in the county in which the Company has its principal office in the State of New Jersey, and mailing such notice to all stockholders whose post office addresses are known or can be ascertained.

XX. The defendants did not at any of the times mentioned in the complaint own or control nor do they now own or control a majority of the outstanding shares of the issued stock of the Company.

XXI. Plaintiff by this action seeks to undo what the great majority of stockholders of the Company have directed should be done, but has failed to make any effort to obtain that relief from the stockholders of the Company, even though plaintiff with two other stockholders could have called a meeting for such purpose, as hereinbefore stated, under the laws of the State of New Jersey.

XXII. By reason of the matters set forth in this defense, plaintiff has failed to comply with the provisions of Federal Equity Rule 27.

[fol. 78] As a second separate defense defendants allege that

XXIII. On April 1, 1931, the annual meeting of the stockholders of the Company was duly held in accordance with its By-Laws at Jersey City, New Jersey, to elect directors for the ensuing year.

XXIV. Prior to said meeting, to wit, on or about March 12, 1931, there was mailed to each stockholder of record of the Company a statement which directed attention, among other things, to said Article XII of the By-Laws. Annexed hereto and marked Exh. A is a copy of so much of that statement that treated of said Article XII.

XXV. Prior to said meeting, plaintiff, upon information and belief, caused to be inserted advertisements in a newspaper or newspapers circulated throughout the United States wherein he voiced his criticism of the management of the Board of Directors of the Company and the payments made under Article XII of the By-Laws and solicited proxies for the meeting to be held on April 1, 1931. Prior to said meeting, there appeared in many newspapers throughout the United States what purported to be an interview between plaintiff and reporters of various newspapers, in which interview plaintiff criticized the Board of Directors of the Company, and, upon information and belief, said interview was so given by the plaintiff for the purpose of obtaining proxies at such annual meeting.

[fol. 79] So widespread was the publicity as a result of the information that was conveyed by plaintiff to the reporters which instigated newspaper articles, editorials and other comments upon the amount of the compensation that was received and would be received by some of the defendants, that, upon information and belief, nearly all of the stockholders of the Company were not only thus fully informed as to the contingent compensation provided by Article XII of the Company's By-Laws, as indeed all of the stockholders had been informed by the aforesaid notice referred to in paragraph XXIV herein, sent to them by the Company. They were also informed by such publicity that the contingent compensation provided by Article XII of the Company's By-Laws was under attack by a stockholder.

XXVI. At the said stockholders' meeting of April 1, 1931, plaintiff was present in person. At that meeting among the candidates for election as directors were the defendants.

Plaintiff announced, prior to the balloting at that meeting, that he was voting against the election of the defendant Hill, nominating one J. J. McGlone as director in place and instead of defendant Hill (said McGlone having had no experience in the tobacco business, having been engaged for a number of years in the steamship business and for a period of about twenty years had been an official of a Steamship Company). Plaintiff stated at that meeting that he did not know the nature of said McGlone's business. [fol. 80] Upon information and belief, plaintiff voted for all of the directors so nominated, with the exception of defendant Hill.

The inspectors of election certified that there were 23,520,228 votes cast on 345,973 shares of Preferred Stock, and 20,917,723 votes cast on 1,240,750 shares of Common Stock, which votes were cast for the following as directors of the Company:

		Number of votes
Messrs.	Richard J. Boylan	2,608,401
	John K. Fletcher	2,615,973
	C. Huntley Gibson	2,615,973
	Patrick H. Gorman	2,616,035
	John G. Hager	2,615,973
	Paul M. Hahn	2,615,973

	Number of votes
Messrs. Tullis H. Harkrader	2,615,973
James B. Harvie	2,615,973
George W. Hill	2,608,201
Charles S. Keene	2,615,973
James E. Lipscomb, Jr.	2,615,973
Arthur C. Mower	2,608,401
Charles F. Neily	2,615,973
William H. Ogsbury	2,615,973
Charles A. Penn	2,608,401
Vincent Riggio	2,608,401
Thomas R. Taylor	2,608,401
J. J. McGlone	11,980

The number of votes cast for the reelection of the Board at that meeting was the largest number of votes ever cast at [fol. 81] any annual meeting in the history of the Company.

All of the candidates were elected as directors, except the said J. J. McGlone who, Mr. Rogers announced, was "intended as a replacement of Mr. George W. Hill." The act of electing those candidates was in fact a reelection of the Board of Directors which included the defendants.

XXVII. Plaintiff well knew, as did all of the stockholders who voted in favor of the reelection of the management, that unless the defendants were reelected as directors for the year 1931, their connections with the Company would have been severed thereby depriving them of the possibility of earning the additional compensation provided for by Article XII of the By-Laws.

XXVIII. By reason of the matters in this defense set forth, the stockholders of the Company, including plaintiff, have ratified the payments made to the defendants in accordance with and under the authority of Article XII of the By-Laws.

As a third separate defense defendants allege that

XXIX. The matters set forth in the amended complaint and the relief sought by the plaintiff involve matters of internal management of the Company which involve the construction of New Jersey statutes and New Jersey laws.

[fol. 82] XXX. The action entitled Richard Reid Rogers v. Hill, et al. was commenced in the Supreme Court of the

State of New York and thereafter removed to this Court. The Courts of the State of New York decline to take jurisdiction of actions which seek to regulate the internal affairs of a foreign corporation which are dependent upon the laws and direction of the Courts of the State in which such a corporation was organized.

XXXI. By reason of the matters in this defense set forth, this Court should decline to take jurisdiction of this action.

As a fourth separate defense defendants allege that as follows:

XXXII. Article XII of the By-Laws was duly adopted as hereinbefore described by the Company and its stockholders in 1912, since which time it has been in continuous operation and effect.

The Company in good faith has conducted its business in reliance upon said By-Law, and, in reliance thereon, has induced and secured the services of its prior President and Vice-Presidents as well as the services of the individual defendants, for more than nineteen years.

The individual defendants (other than defendant Taylor, who has received no compensation under the By-Law) have each continued and are now continuing in the service of [fol. 83] the Company in reliance upon the continued operation of the By-Law, and said By Law was a part of the contract of employment by which the Company secured the services of the individual defendants (other than defendant Taylor) and the individual defendants (other than defendant Taylor) rendered their services to the Company.

XXXIII. During the continued existence of said By-Law, no stockholder of the Company has initiated any intra corporate action for the purpose of repealing said By-Law, although, during the whole period that said By-Law was effective, under the laws of New Jersey any three stockholders of the Company could have called and can call a meeting of the stockholders for that purpose.

During all of said period that the said By-Law has been in effect, no stockholder has attempted to question its validity in the courts of any jurisdiction.

By reason of the matters hereinbefore in this defense set forth, plaintiff is now barred by laches and estopped from maintaining this action.

As a fifth separate defense defendants allege that

XXXIV. On July 19, 1907, the United States commenced an action against the Company, twenty-nine individual defendants, sixty-five American corporations, and two English corporations (United States v. The American Tobacco [fol. 84] Company, et al.) the object of which was to prevent the continuance of alleged violations of the first and second sections of the Anti-Trust Act of July 2, 1890.

XXXV. The principal defendant was the Company. The Government contended in its complaint that, by the control which the Company exercised over the other corporations named as defendants through either direct or indirect stock ownership, the Company had a virtual monopoly over the entire tobacco industry of the United States.

XXXVI. On May 29, 1911, the Supreme Court of the United States issued its mandate whereby the Court below was directed to ascertain and determine "upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly and in harmony with and not repugnant to the law."

XXXVII. On October 16, 1911, the defendants filed in the Circuit Court of the Southern District of New York a petition proposing a plan of dissolution of the combination pursuant to the mandate of the United States Supreme Court. After hearing objections, the Circuit Court duly entered a decree, dated November 16, 1911, which provided for (1) a division among four companies of the former domestic tobacco business of the Company and (2) the disintegration of accessory companies.

[fol. 85] XXXVIII. The decree required the Company to divide the domestic manufacturing assets and business controlled by it among four companies, to wit, The American Tobacco Company (Company), Liggett & Myers Tobacco Company (a newly formed company), P. Lorillard Company (a newly formed company), and the R. J. Reynolds Tobacco Company. The decree was estimated by the Circuit Court "to provide for a division of the then business in tobacco and its products among the various manufacturers as follows:

Division of Volume and Values of Business

	Division of volume and value of business pursuant to the decree		Percentage of business controlled by American Tobacco Company prior to decree
	Percentage in volume (lbs. or thousands)	Percentage in value	
Cigarettes:			
American Tobacco Co	37.11	33.15)	
Liggett & Myers	27.82	21.03)	
Lorillard Co	15.27	26.02)	80 (approx.)
Others never in any way connected with the combination	19.80	19.80)	
Smoking Tobacco:			
American Tobacco Co	33.08	40.53)	
Liggett & Myers	20.05	16.47)	
Lorillard Co	22.82	18.88)	
Reynolds Tobacco Co	2.66	2.73)	79 (approx.)
Others never in any way connected with the combination	21.39	21.39)	
[fol. 86] Plug Tobacco:			
American Tobacco Co	25.32	22.98)	
Liggett & Myers	33.83	37.84)	
Lorillard Co	3.73	4.64)	
Reynolds Tobacco Co	18.07	15.49)	80 (approx.)
Others never in any way connected with the combination	19.05	19.05)	
Fine-cut Tobacco:			
American Tobacco Co	9.94	13.54)	
Liggett & Myers	41.61	36.26)	
Lorillard Co	27.80	29.57)	80 (approx.)
Others never in any way connected with the combination	20.65	20.65)	
Cigars:			
American Cigar Co	6.06	8.90)	
Lorillard Co	5.72	2.88)	
American Stogie Co	1.58	1.58)	13 (approx.)
Others never in any way connected with the combination	86.64	86.64)	
Little Cigars:			
American Tobacco Co	15.43	13.41)	
Liggett & Myers	43.78	38.69)	
Lorillard Co	33.84	40.95)	93 (approx.)
Others never in any way connected with the combination	6.95	6.95)"	

[fol. 87] XXXIX. The Company met with severe competition from the newly created companies and R. J. Reynolds Tobacco Company. The latter entered the cigarette field after the disintegration of the Company. The result of that competition was to reduce the percentage of cigarettes sold by the Company, so that by 1925 the percentage of cigarettes that it sold in the United States had fallen to 21.80%.

XL. Defendant Hill together with the late defendant Penn created the Lucky Strike cigarette; the latter, who was in charge of manufacturing and was during his lifetime one of the greatest authorities upon tobacco and mechanics of manufacturing in the United States, worked out the blend and defendant Hill designed the package in which the new cigarette was to be sold.

XLI. The Lucky Strike cigarette was the first blended cigarette manufactured by the Company, which had theretofore been manufacturing and selling cigarettes made only of Virginia or Turkish tobacco.

XLII. Thereupon, and under the guidance of defendant Hill, the Company proceeded to concentrate upon the sale of the Lucky Strike cigarette.

XLIII. In December of 1925 the then President of the Company died, and in December, 1925, defendant Hill was elected to the Presidency of the Company. Under his [fol. 88] management and in cooperation with the late defendant Penn and the other members of the Board of Directors, most of whom were employes of the Company, a completely new and different policy was inaugurated in all of the departments. A radical change at that time was required because the Company had lost its leadership in the tobacco industry and, in fact, was subordinate to the position held by R. J. Reynolds Tobacco Company.

XLIV. As a result of the services rendered by the defendants under the leadership of defendant Hill, the following results were achieved:

(a) Gain in Sales of Cigarettes

Year	Percentage
1926	20.14%
1927	22.44%
1928	29.59%
1929	34.16%
1930	38.10%

(b) Net Earnings of the Company After Deducting all Charges and Expenses for Management, Taxes, etc.

Year	Amount
1924	$20,839,694
1925	22,288,596
1926	22,549,094
1927	23,309,689
1928	25,066,299
1929	30,231,348
1930	43,345,370

[fol. 89] (c) Dividends on Common Stock

Year	Amount
1924	$12,202,675
1925	16,109,922
1926	15,622,486
1927	15,622,856
1928	15,623,172
1929	21,091,536
1930	29,293,983

In the first quarter of 1931, besides the regular dividend of $1.25 per share, an extra dividend of $1.00 per share was declared. The total dividends paid so far for the year 1931 exceed $28,300,000.

XLV. Prior to 1926 the Company distributed its advertising expenditures among all its products. They included the following brands amongst others:

Smoking Tobacco Brands

Lucky Strike	Bull Durham
Tuxedo	Five Brothers
Peerless	Old English

Plug Tobacco Brands

American Navy	Ivy
Square Deal	Corker
Spear Head	Town Talk
Piper Heidsieck	Newsboy
Standard Navy	

[fol. 90] Cigarette Brands

Sweet Caporal
Pall Mall
Hassan
Mecca

Little Cigar Brand

Sweet Caporal

Fine Cut Brand

Virgin Leaf

Beginning in 1916 the trade name or brand "Lucky Strike" which up to that time had been used only for tobacco was for the first time used for the cigarette which is now the well-known Lucky Strike cigarette.

XLVI. Upon defendant Hill's election to the Presidency, and under his guidance, the Board of Directors of the Company instituted a complete re-organization of the many departments of the Company. This has resulted in the Company functioning in the following manner:

(a) Defendant Hill, as Chief Executive of the Company, has general supervision of all its departments, including sales, advertising, foreign operations, manufacturing, exporting, auditing, purchasing of leaf tobacco, etc. That supervision involved and involves more than mere cursory passing upon the functioning of those different departments; it involved and involves an actual participation in the programs of those departments, and particularly [fol. 91] in those branches of the Company that are of paramount importance in its development.

One of the chief functions and responsibilities resting upon defendant Hill is that connected with advertising, which entailed an expenditure in 1930 of $20,470,758.43. That amount was part of the expenditure that had to be recouped, and was recouped, by the Company before the net profit in excess of $43,000,000 was made for the year 1930.

The advertising is divided into six different departments, or branches, to wit:

Newspaper copy,
Magazine advertisements,
Displays,
Lucky Strike radio hour,
Publicity, and the
Cremo radio program.

The formula or plan for newspaper advertising, which is the basis of the advertising program, is originated by a committee of which the defendants Hill and Riggio are members. This committee has originated some of the slogans which have helped create the demand for Lucky Strike cigarettes and which are worth today incalculable amounts.

One of the most important branches of the tobacco industry is the purchasing of tobacco. Defendant Hill has a thorough knowledge of all the varieties of tobacco. At an early stage of his career he had his experience in the tobacco fields where he acquired first hand knowledge of the [fol. 92] manner in which tobacco was grown, and the ability to select the proper kinds. In connection with the purchasing of tobacco, the requirements of the Company are such that plans must be made far ahead to take care of its needs. In order to accomplish this properly, defendant Hill has instituted a Committee on Leaf Tobacco. This Committee plans the buying schedule to take care of its entire needs. That Committee was composed during the lifetime of Mr. Penn, of the defendants Hill and Neiley and the late defendant Penn. This Committee coordinates with and cooperates with the Sales Department. The tremendous increase each year of the needs of the Company must be anticipated. This involves more than an anticipation of the next year's production because it takes at least 2 years or more to place tobacco in such condition that it can be used in the different products manufactured by the Company. This leaf buying under the leadership of defendant Hill is of tremendous importance and value to the Company.

Lucky Strike cigarette is the finest blended cigarette sold in the market. In order to maintain that high degree of excellence, it is necessary to keep in daily contact with the variations in the tobacco crops. At one time, tobacco from a certain territory may be of the character that will fit into the blend and the next season tobacco from that

territory may sustain a change including either an increase or decrease in some of its constituents or a change in quality making it unsuitable for use in the blend. The Leaf Com-
[fol. 93] mittee under the direction of the defendant Hill performs the important function of maintaining the high quality of the blend which is so essential to the success of the Company.

Defendant Hill is in frequent communication with London to receive the reports of the English branch of the Company's business, in order to be fully apprised of all of its important matters enabling him to make suggestions and give necessary orders with respect to its operations. The English operations have become so large in volume and in such a condition that defendant Riggio has been selected to supervise them since the resignation of defendant Mower but during the growth of the English business which increased from 365,000 cigarettes per day in 1928 to over 12,000,000 cigarettes per day at the time that Mower resigned, defendant Hill by means of weekly telephone instructions to defendant Mower gave definite plans and advice which resulted in the attainment of that tremendous growth, which happened in England during the period when that country was in the throes of a severe depression, and in fact was suffering a loss of financial prosperity which resulted in an increased application of the dole and the departure from the gold standard.

The defendant Hill's working hours have not been the working hours of the average employee of the Company, that is, from nine to five; in addition, he devotes night after night to the origination of advertising slogans, to the development of sales programs, to the development of manu-
[fol. 94] facturing devices, to communication with other executives of the Company, either by telephone or by personal conference, for the benefit of the Company. He has instituted economies that have saved the Company in the past and are saving it at the present time, millions of dollars a year. The services that have been rendered by defendant Hill have been extraordinary and unique to such an extent that there could be no other one man found in this country who could perform all the functions which he performs. At no time has the compensation received by defendant Hill been greater than the fair and reasonable value of the services rendered by him for the period for

which such compensation was paid, and the compensation now being received by said defendant, including the compensation under Article XII of the By-Laws, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(b) Upon the disintegration of the Company, it retained the following factories:

Durham, N. C. (Blackwell's Durham Tobacco Co.),
New York (Butler-Butler, Inc.),
Milwaukee, Wis. (F. F. Adams Tobacco Co.),
Danville, Va., Danville Branch—little cigars;
Baltimore, Ellis A—little cigars;
New York, Duke Branch;
Baltimore, Felgner Branch;
Louisville, Finser Branch;
[fol. 95] New York, Kinney Branch;
Baltimore, Marburg Branch;
Richmond, Mayo Branch;
Nashville (Nashville Tobacco Works),
Richmond (R. A. Patterson Tobacco Co.),
Brooklyn, Penn Street Branch—cigarettes;
Reidsville, N. C. (F. R. Penn Tobacco Co.),
Middletown, Ohio, Sorg Branch;
Louisville, National Branch,

where the manufacturing of tobacco took place.

The manufacturing of tobacco was in charge of the late defendant Penn, with whom the defendant Neiley coordinated. They instituted a policy of concentration in manufacturing, which resulted in the elimination of all factories but those situated at Durham, Louisville, Reidsville, Richmond and Nashville.

The Richmond factory is the last one built. The building of that factory was planned and supervised by those defendants, and is considered the best of its kind in the tobacco industry.

They have also concentrated the leaf handling and stemming operations. As a result of their services, a uniformity of production and economy of manufacture have been effectuated, so that the cost of producing cigarettes has been constantly reduced. One of the great outstanding features of the Lucky Strike cigarette is the "Toasting Process". That was originated by the late defendant

[fol. 96] Penn. The "Toasting Process" results in the elimination of greater quantities of nicotine, acetic acid, ammonia, ethyl acetate, formic acid, furfural, isovaleric acid, and waxy substance as compared with the quantities removed by earlier methods. Those chemical constituents in a large measure make up the "bite" in tobacco. The "Toasting Process" in the main consists of subjecting the tobacco to heat without destroying the quality of the tobacco. By the use of the "Toasting Process" a sweeter and mellow tobacco with less harsh irritants is produced. In order to apply that high temperature without injuring the quality of the tobacco, special machines were invented under the guidance of the late defendant Penn. No other tobacco company has been successful in applying heat to tobacco in that manner. Machines have been developed under the guidance of the late defendant Penn to distribute the proper amount of tobacco on the cigarette paper so that the cigarette should have the proper weight in accordance with a predetermined formula; machines have been developed that automatically count the cigarettes in lots of twenty, wrap them with paper-backed foil, over which is applied the outside label, and affix United States revenue stamps on the individual packages, sealing the same; machines have been developed which wrap and seal the package with cellophane.

At the Richmond factory very many different brands of smoking tobacco are manufactured and tobaccos from various parts of the world are in use there. More than 4,800 different kinds and sizes of wrapping material are used. [fol. 97] The supervision and management of that branch require a thorough knowledge of and familiarity with all tobaccos, blends and flavors.

In 1929 the late defendant Penn was made Vice-President of the American Cigar Company, in charge of its entire production, at which time its production was small. The cigars were manufactured by hand in various factories scattered throughout the country. In a period of less than ten months the manufacture of cigars was entirely revolutionized into the making of cigars by machines and the concentration of large factory units. Following the policy of concentrating that had been adopted with cigarettes, the Company decided to concentrate upon one cigar and the brand taken for development was the Cremo cigar. When

the late defendant Penn took charge of the production, the output was approximately 90,000 cigars a day. Under his guidance and at the time of his death the approximate daily output was 2,000,000 cigars.

The services that the late defendant Penn and defendant Neiley rendered were extraordinarily valuable to the Company, reduced the cost of manufacturing, enabling thereby the stockholders to have a larger return. The services rendered by the late defendant Penn were far more valuable to the Company during the period for which they were rendered than any compensation paid to him, including any compensation which may have been received by him or may be received by his representatives under Article XII of the [fol. 98] By-Laws. At no time has the compensation received by the defendant Neiley been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including any compensation under Article XII of the By-Laws, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(c) The defendant Mower, who resigned from the Company on July 31, 1931, was in charge of the English branch of the Company's business. The English branch has been and is engaged in the manufacturing of a brand of cigarette called Kensitas, which is a different type and kind of cigarette than the Lucky Strike, due to the fact that the English taste is not for a blended cigarette but a Virginia cigarette. Defendant Hill and Mower have been associated for many years with the result that they were thoroughly imbued with one another's methods and ideas. Defendant Mower was selected by defendant Hill as the man to exploit the Company's business in England and it was because of said defendant Mower that defendant Hill approved the extension of the business to England—an extension which, already successful, offers vast possibilities to the Company and to the stockholders of the future and is today one of the Company's valuable assets. Defendant Mower had been in charge of the English branch since 1928, at which [fol. 99] time the volume of its business was comparatively small. Under that defendant's management, it has de-

veloped to the point where it now has the second largest volume of sales of shilling cigarettes in Great Britain. That defendant increased the sales of cigarettes by a vigorous advertising campaign, improved concentration of methods of manufacturing and production, improvements in the selling organization and bringing to England American methods of doing business. Prior to the assumption of the leadership of the English branch, defendant Mower had been the Vice-President of the Company coordinating in advertising and sales. The devotion of that defendant to the Company had been such that, despite the advice of his physicians and at great peril to his health, he continued with the Company until his physical condition became such that he was compelled by his medical advisers to retire from all business activities. The services rendered by defendant Mower were far more valuable to the Company than any compensation paid to him, during the period for which they were rendered, including any compensation which may be received by him under Article XII of the By-Laws.

(d) Defendant Riggio was and is the Vice-President in charge of sales and advertising, responsible for the organization and function of the sales department. The sales department is divided into five sections, each section being responsible for a certain territory in the United States. Each section is in charge of a section manager, who in turn has field managers, division managers and retail salesmen. [fol. 100] The responsibility for the function and activities of all the men in those departments is a part of the duties imposed upon defendant Riggio. Among other departments for which the defendant is responsible are the following: the advertising department dealing with displays and posters, the navy department, Turkish cigarette department, the high grade tobacco department, private brands, the export department, and the Lucky Strike radio hour.

In planning the Lucky Strike radio hour, defendant Riggio coordinates with defendant Hill. The Lucky Strike radio hour is of great importance to the Company. It is a form of advertising that reaches millions of people from coast to coast. The Lucky Strike radio hour is on the air on Tuesdays, Thursdays and Saturdays of each week by means of a national broadcasting system. The purpose of

the Lucky Strike radio hour is to accelerate the sales of the Lucky Strike cigarettes, which is the brand of cigarette upon which the Company concentrates in this advertising. The success of the selling program is dependent to a great extent upon the success with which the Lucky Strike hour is received by the radio public. The planning of this hour involves a great deal of care and attention, as the hour is comprised of a musical performance combined with an advertising program. One must lead into the other so as to hold the greatest interest for the public and at the same time increase the public's desire to purchase the Lucky Strike cigarette. If this hour is not well planned, it would [fol. 101] mean a loss of money to the Company by reason of the expense that it entails. Furthermore, the radio hour must fit into and supplement the other advertising media used by the Company.

Defendant Riggio was and is in charge of the sales and advertising of American Cigar Company, a subsidiary of the Company, which Cigar Company has increased its sales from 90,000 cigars a day in 1929 to more than 2,000,000 a day at the present time. Defendant Riggio is responsible for the organization of the sales department and has instituted economies that have resulted in savings of large sums of money for the Company each year.

Illustrating the value of the services rendered by that defendant is the increase in the proportion of Lucky Strike cigarettes sold, with the slight increase in the cost of sales, to-wit:

	Increase in quantity of sales	Percentage of cigarettes sold	Cost of sales
1929	36,992,668,284	34.16	$4,242,814.46
1930	43,212,434,694	38.10	4,901,119.16

Defendant Riggio is one of the outstanding men in the tobacco industry to-day. He is one of the great sales executives of the United States. His services have been of a unique and peculiar value that cannot readily be placed. He has a thorough knowledge of the tobacco industry and the psychology of the buying public. He has the unique ability or organizing sales campaigns that have been with- [fol. 102] out parallel in the history of the tobacco indus-

try. He has maintained a morale in the sales organization of the Company that results in his subordinates functioning at the highest degree of efficiency. At no time has the compensation received by the defendant Riggio been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including any compensation that he may receive under Article XII of the By-Laws, is not greater than the fair and reasonable compensation for the services now being rendered by him.

XLVII. The job of manufacturing and vending over one hundred and fifty million articles daily is an almost superhuman task. In itself it constitutes a gigantic service by this Company to the public. First the acquisition and selection of the raw materials of the highest quality and yet adaptable to economic needs of the industry, the handling and preparation of those materials so as to be ready for each day's supply, the maintenance of uniform standards of grade, quality and taste so as to satisfy a highly discriminating public, form the primary basis of the business. Unless this is maintained at the highest possible standard and uniformly maintained, no ingenuity can induce the consumer to give his patronage.

Then the exact details of the blended mixture, the hygienic treatment, and the interminable organization of [fol. 103] human effort involved in the physical process of manufacturing, gathering, wrapping, packing and delivering daily over one hundred and fifty million articles is a problem which would have been impossible at any time during the history of civilization up to the last twenty years. It requires eternal vigilance for the latest development in the art, the utilization of every cost-saving device, and ceaseless ingenuity in search of constant improvement. When it is realized that from this vast daily turnover the corporation makes but a fraction of a cent per article and the Government by its excise tax alone charges one-third of a cent, some idea of the tremendous consequence of every hundredth of a cent in cost per article may be gleaned.

But quite aside from this tremendous manufacturing achievement there is a still greater problem involved in

the sales. In no industry in the world is competition keener or more ruthless than in the cigarette business. The competitors are powerful, ingenious and alert to every possible advantage, spending millions of dollars in publicity both in defensive and offensive tactics, and no manufacturer can hope even to hold his own with them unless he can develop a product in fact superior to theirs as to quality and as to certain innate characteristics unsusceptible of imitation. After all, a cigarette is but a small roll of tobacco cased in paper. The gamut of attributes of such an article is essentially limited. But first the quality bears infinite study and is capable of great skill in selection; then the nature of the blend permits the greatest ingenuity; [fol. 104] and thereafter the process involves secret treatment so as to eliminate harmful constituents and to improve the desirable ones. Therein lies opportunity for continuous scientific laboratory tests and analyses, all to the end that the ultimate smoking of the cigarette shall produce the greatest delectable sensation with the least deleterious effect upon the smoker. Then of course the style and fashion of the package are most important. It must appeal to the eye; it must be easy of handling; it must preserve exactly the proper condition of the article contained; and yet it must economically fall within the narrow margin of cost of which so cheap an article permits.

Having carefully and unremittingly attended to all these problems and having built up a vast organization thoroughly attuned to the daily needs, it still becomes essential for the management constantly to find new and interesting themes by which to keep the product always in the public mind without arousing the antagonism of offensive repetition; and this need is never completely discharged. The greater the growth of the business the more accentuated becomes the need.

XLVIII. As remarkable as the growth of the business, is the increase, in the number of Lucky Strike cigarettes sold in 1930 as compared with the increase of cigarettes sold in the United States. In that year, the total increase in cigarettes, according to the Revenue figures of the Federal Government, was approximately five hundred million, [fol. 105] whereas the increase in Lucky Strike cigarettes was nearly six thousand million; in other words, the Com-

pany took approximately five thousand five hundred million cigarettes from its competitors. For the first ten months of 1931 the Company has continued to gain in the sale of its Lucky Strike cigarettes at the expense of its competitors in practically the same ratio as it had for the year 1930, in that the sale of other cigarettes has decreased by four thousand four hundred seventy-nine million cigarettes, whereas the Lucky Strike sales have increased by two thousand three hundred ninety-five million cigarettes.

When it is realized that in a year of depression such as 1930 this management showed a net profit of over forty-three million dollars and paid the United States Government over one hundred and fifty millions, some idea can be gained as to the efficiency with which this task has been done. Of course, such a work requires an army of people. It demands the highest skill in each department and the number of departments is numerous. But above all this army of highly efficient workers there is one chief executive—who must be alive to every section of every department of the business. The chief executive must surround himself with adjutant executives so as to carry out his policies and keep him alive to every development. Such has been the function of George W. Hill and such are the functions of the Board of Directors. Moreover, the quality of this work is best attested by the fact that in these days of depression this great Company is almost unique among [fol. 106] the industries of the world in showing a substantial advance in profits over the best year it has ever had in its history.

XLIX. The various forms of compensation (in addition to a fixed salary) paid to the executors and key men of the Company by means of a participation in the profits or by an allotment of shares of its stock are based upon a principle of administration of the Company conceived by one of the greatest industrial leaders of all times, the late James B. Duke, and recognized by his successors in office. That principle is, in order to obtain the greatest effort, services, loyalty, efficiency and results a compensation other than a fixed compensation must be held out to the men who are in positions of responsibility; that compensation must be of such a nature as to make those men feel and realize that they are part owners of the business and

that their personal success and prosperity are measured by the success and prosperity they achieve for the Company and its stockholders. The fruition of that principle is established and justified in its application, in the continuous increasing success of the Company, and its maintenance is essential to its future prosperous life.

L. That Article XII of the By-Laws was duly authorized by the stockholders of the Company at a duly constituted meeting after due notice given to all of the then stockholders of the Company and said plan was duly authorized and is legal and valid under the laws of the State of New Jersey.

[fol. 107] Under the laws of the State of New Jersey the directors had authority to appoint such officers and agents as the business of the Company might require and to allow them suitable compensation, and by the Charter and By-Laws of the Company *and* the administration of the affairs of the Company was vested in the directors and by authority thereof said directors had power to fix the compensation of all officers and employees of the Company; that pursuant to said laws, the Charter and By-Laws the directors had authority to pay such compensation as was received by the defendants and that the compensation so paid did not in the aggregate constitute more than fair and reasonable compensation for the services rendered by those defendants respectively.

Upon information and belief, the stock which is now represented by the Common Stock of which plaintiff is the record holder voted at the meeting of March 13, 1912, for the resolution authorizing the adoption of Article XII of the By-Laws.

LI. Plaintiff at the annual stockholders meeting, in attempting to prevent the defendant Hill from being reelected as a director of the Company, was imperiling and prejudicing the investment of some 40,000 stockholders, by nominating, in place and instead of defendant Hill—who is the one who has been so largely responsible for the continuous success of the Company and has surrounded himself with associates who are of extraordinary capacity and ability and who himself knows every branch of the tobacco industry from the purchasing of the leaf to the ultimate [fol. 108] disposition of the finished product—a man who

had no experience whatsoever in the tobacco business, a man who knew nothing about the leaf buying, who knew nothing about the blending of cigarettes, who knew nothing about advertising, who had been associated for twenty years with a company whose business is wholly foreign to the tobacco business and of whom plaintiff stated at the meeting that he did not know him, of him or about his qualifications.

Wherefore defendants demand judgment that the amended complaint be dismissed with costs.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company. Office & P. O. address: No. 25 Broadway, Borough of Manhattan, New York City. Victor J. Dowling, Louis S. Levy, William M. Parke, George W. Whiteside, J. Arthur Leve, Counsel.

[fol. 109] *Duly sworn to by Charles F. Neiley. Jurat omitted in printing.*

[fol. 110] EXHIBIT A TO ANSWER

Article XII of the By-Laws

The compensation so taken into account in making allotments under the Plan, included money compensation of every kind, whether fixed salary or contingent compensation. It therefore included, as to the President and the five Vice-Presidents, compensation under Article XII of the by-laws adopted by vote of the Stockholders of the Company in 1912.

That by-law is believed to have been originally suggested by the late Mr. James B. Duke, and we understand that by-laws similar in principle and percentage, although differing in form and method of application, were, at his instance, adopted by most of the other companies that emerged from the old American Tobacco Company as a result of the court decree in 1911.

That by-law provided in effect that in any year beginning with the year 1912 in which the net profits earned by The American Tobacco Company in the tobacco business

exceeded $11,369,000 (to wit, $8,222,245.82, the amount of net profits earned in 1910 by the businesses retained by The American Tobacco Company under the Federal decree in the anti-trust case, plus approximately $3,147,000, annual dividends on the 6% Preferred Stock of the Company) the Treasurer of the Company was to pay an amount equal in the aggregate to 10% of such excess of net profits to the President and the five Vice-Presidents of the Company. One-quarter, or 2½%, of such amount was to go to the President and the remaining 7½% to be divided among the [fol. 111] five Vice-Presidents. Such payments were to be as salary for any such year, in addition to the fixed salaries of each of said officers.

It was provided that the net profits for the purposes of such by-laws should consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as should be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6% dividends on $52,459,400 of its 6% preferred stock, to which profits should be deducted, as the case might be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year, of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Copmany, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited. It is to be noted that although the Company ordinarily has income from sources, other than those included in this by-law—such, for instance, as that from the American Cigar Company and certain other Subsidiaries—the income from such other sources is excluded and this compensation is restricted and based only upon the profits from sources included in the language of the by-law. It will also be noted that this compensation, based upon the net profits of the Company, was adopted by the Stockholders in 1912 and is in no wise dependent on any vote of the Directors or action of officers. It is, as it states itself to be, a "salary for the year, in addition to the fixed salary [fol. 112] of each of said officers." The statement of net profits shown on the Company's annual reports to stock-

holders represents the amount of net profits remaining after the deduction of such compensation, as well as all expenses of management of whatsoever character, including depreciation and obsolescence and also after deducting taxes, of which over One hundred and fifty million dollars ($150,000,000) were paid to the United States Government alone for the year 1930.

The sound common sense underlying Mr. Duke's plan of contingent compensation to executives is amply demonstrated by the great advances made by the several companies to which it was applicable, but in no case has it been more completely justified than in that of The American Tobacco Company as exemplified by its progress and brilliant success.

[fol. 113] IN UNITED STATES DISTRICT COURT

E-59-115

[Title omitted]

ORDER FOR FURTHER PARTICULARS—Nov. 6, 1931

A motion having been made by defendants George W. Hill, C. F. Neiley, V. Riggio, The American Tobacco Company, and Charles A. Penn (now deceased) for an order requiring the plaintiff to amend his bill of complaint by setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's complaint, in accordance with the notice of said motion;

And after hearing William M. Parke, Esq., of counsel for defendants George W. Hill, C. F. Neiley, V. Riggio, The American Tobacco Company, and Charles A. Penn (now [fol. 114] deceased), in support of the motion, and Richard Reid Rogers, sua persona, for plaintiff, in opposition thereto;

Now, on motion of Chadbourne, Stanchfield & Levy, attorneys for defendants George W. Hill, C. F. Neiley, V. Riggio, and The American Tobacco Company,

It is ordered, that defendants' motion to compel plaintiff to amend his bill of complaint by setting out a further and

better statement of the nature of plaintiff's claim be and the same hereby is granted as follows:

1. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 8 of the bill of complaint, by setting forth

(a) the Employees' Stock Subscription Plan;

(b) the resolution under which said Plan was adopted by stockholders on July 28, 1930.

2. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 12 of the bill of complaint, by setting forth

(a) the by-law adopted at a stockholders' meeting of the defendant company on February 21, 1912;

(b) notice of said meeting sent to stockholders;

(c) the names of the proxies who were themselves financially interested and who expected to and did thereafter [fol. 115] receive the profits paid out by the defendant company pursuant to said by-law.

3. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 13 of the bill of complaint, by setting forth

(a) a copy of the written demand made on the defendant The American Tobacco Company to institute action against the individual defendants;

(b) a copy of the letter addressed to the plaintiff by the company in which it declined to bring such suit.

4. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 14 of the bill of complaint, by setting out a copy of the pamphlet distributed to stockholders by defendant George W. Hill on or about March 14, 1931.

Woolsey, United States District Judge.

Plaintiff consents to the form of the order but excepts to the order itself.

Rich'd Reid Rogers.

[fol. 116] IN UNITED STATES DISTRICT COURT

E-59-115

[Title omitted]

STIPULATION AS TO FURTHER PARTICULARS, ETC.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, as follows:

1. The information directed to be furnished in this action has been furnished in an amended complaint served subsequent to the making of the motion for further particulars (which service of said amended complaint was made without prejudice to the existence of such motion), except the following:

(a) Further and better particulars as to the matters stated in paragraph 8 of the bill of complaint by setting forth

(i) the Employees' Stock Subscription Plan;

(ii) the resolution under which said Plan was adopted by stockholders on July 28, 1930.

[fol. 117] (b) Further and better particulars as to the matters stated in paragraph 14 of the bill of complaint by setting out a copy of the pamphlet distributed to stockholders by defendant George W. Hill on or about March 14, 1931.

2. That such information shall be furnished in the form of a bill of particulars in lieu of the service of an amended complaint setting forth such information, but such bill of particulars shall be deemed for the purposes of any motion that may be made by any party to this action as if incorporated and set forth at length in the amended complaint.

3. Such information shall be furnished in the form of a verified bill of particulars within ten (10) days after service of a copy of an order granting the undersigned defendants' motion for further particulars.

4. The undersigned defendants' time to answer, move, or otherwise plead with reference to the amended complaint

shall be extended to and including twenty (20) days after service of the verified bill of particulars.

Dated New York, November 6, 1931.

Rich'd Reid Rogers, Plaintiff, sua persona. Chadbourne, Stanchfield & Levy, Attorneys for Defendants Hill, Neiley, Riggio, and the American Tobacco Company.

So ordered.

Woolsey, United States District Judge.

November 6, 1931.

[fol. 118] IN UNITED STATES DISTRICT COURT

E-59-115

[Title omitted]

BILL OF PARTICULARS

Pursuant to order of Court entered herein November 7, 1931, plaintiff herewith furnishes further and better particulars of all matters covered by said order, except those as to which the further and better particulars have already been furnished by an amended complaint, as appears by stipulation of the parties hereto entered herein November 7, 1931.

1. With reference to the employees' stock subscription plan referred to in paragraph 8 of the original complaint and in paragraph 8 of the amended complaint, and covered by paragraph 1 (a) of the order, plaintiff refers to the plan adopted by resolution of the stockholders July 28, 1930, a copy of which is annexed hereto and marked "Exhibit A"; to the agreement between the defendant The American Tobacco Company and Guaranty Trust Company of New York and Junius Parker dated January 30, 1931, together with the subscription agreement therein referred to which was signed by the defendant, George W. Hill, in the amount of 13,440 shares, the defendant, Charles A. [fol. 119] Penn, in the amount of 8,025 shares, the defend-

ant, V. Riggio, in the amount of 4,000 shares, the defendant, C. F. Neiley, in the amount of 3,000 shares, and the defendant A. C. Mower, in the amount of 1,000 shares, of common stock B, a copy of which agreement, with the subscription agreement therein referred to, appears on pages 16 to 28, inclusive, of the pamphlet issued by George W. Hill, annexed hereto and hereinafter referred to as "Exhibit C"; and to the further fact that in carrying out said plan the Guaranty Trust Company of New York on February 10, 1931, paid the defendant, The American Tobacco Company, $1,417,800 for 56,712 shares of said common stock B, out of which the allotment to the individual defendants referred to above was made.

2. With reference to the resolutions under which said employees' common stock subscription plan was adopted by the stockholders on July 28, 1930, referred to in paragraph 8 of the original complaint and in paragraph 8 of the amended complaint, and covered by paragraph 1 (b) of the order, plaintiff annexes hereto a copy of said resolutions and makes the same a part hereof, marked "Exhibit B."

3. With reference to the pamphlet distributed to stockholders by the defendant, George W. Hill, on or about March 14, 1931, referred to in paragraph 14 of the original complaint and covered by paragraph 4 of the order, plaintiff annexes hereto a copy of said pamphlet and makes the same a part hereof, marked "Exhibit C."

Dated New York, N. Y., November 10, 1931.

Richard Reid Rogers, Plaintiff in sua Persona. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

[fol. 120] *Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.*

[fol. 121] EXHIBIT A TO BILL OF PARTICULARS

Employees' Stock Subscription Plan

I. Purpose

The purpose of this Plan is to accord such employees of The American Tobacco Company (herein called the "Cor-

poration") and its subsidiaries, and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of the stock of the Corporation.

II. The Plan

The Plan is to allot for subscription, in the manner and upon the conditions herein provided, by way of additional compensation for services to be rendered, shares of the unissued Common Stock B of the Corporation which may be authorized by amendment to the Certificate of Incorporation of the Corporation voted at the same meeting of stockholders at which this Plan may be approved, to such of the employees of the Corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected as hereinafter set forth; provided, however, that there shall at no time be any issuance of shares under this Plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

[fol. 122] III. Execution of the Plan

The Board of Directors may, at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries, and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose.

IV. Rights of Subscriber Prior to Payment

No stock shall be delivered until such stock has been fully paid for. The Board of Directors, however, may provide that subsequent to subscription for said stock and prior to the time the full subscription price has been paid,

the subscribers shall possess such voting (if any) and other rights pertaining thereto, including the right to receive dividends thereon and to subscribe to any new issue of stock of the Corporation, that may be permitted to other holders of Common Stock B of the Corporation. Any and all payments accruing to any such subscriber, by way of dividends or otherwise, prior to the full payment for his stock shall be credited to the subscriber on account of the payments agreed to be made by him in the purchase of said stock, and shall not be paid directly to such subscriber until full payment for his stock has been made.

[fol. 123] V. General Conditions

The Board of Directors may attach to each offering of stock such detailed conditions governing the cancellation and withdrawal of subscriptions and refund of payments and the handling of the same in case of death, disability or pensioning of employees, temporary suspension of employment, permanent discharge or leaving service, or providing for other special situations, in such manner as it shall deem reasonable and appropriate and best calculated to effectuate the purposes of this Plan; provided that in no event shall any amounts paid in be forfeited; and in case of cancellation or withdrawal, all such amounts shall be returned with interest at such rate, not to exceed Six Per Cent (6%) per annum, as the Board of Directors may determine. No employee or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

VI. Recall or Amendment

This Plan may be recalled, abolished, revised, amended, altered or changed, as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for the year 1920.

[fol. 124] EXHIBIT B TO BILL OF PARTICULARS

Resolution Adopted at Special Meeting of the Stockholders of the American Tobacco Company on July 28, 1930

(Relating to Employees' Stock Subscription Plan)

Whereas, the officers of the Company have formulated a plan to accord to such employees of The American Tobacco Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as therein provided, by way of additional compensation for services to be rendered, an opportunity to purchase the capital stock of the Corporation and to participate in the other benefits of the plan; and

Whereas, said plan has been considered by the Board of Directors and by resolution duly passed at its meeting held on June 25, 1930, the Board of Directors declared that in its opinion the adoption of said plan is advisable; and

Whereas, the plan so formulated and approved and sent to the stockholders with the notice of this meeting has been presented at this meeting, and we are of the opinion that it will be in the best interests of the Company to adopt the same;

Now, therefore, be it resolved that the said plan be and the same hereby is approved and adopted.

Further resolved that the President, the Board of Directors and other proper officers of the Company be and [fol. 125] they hereby are authorized, directed and empowered, to take all such steps and do any and all such acts and things that may be authorized by the terms of said plan as well as any and all such other acts and things as may be necessary and proper to execute, carry out and accomplish the full purpose and intent of said plan and of this resolution.

EXHIBIT C TO BILL OF PARTICULARS

The American Tobacco Company

Employees' Stock Subscription Plan, 1931

For the information of the Stockholders of The American Tobacco Company, there is submitted this statement

relative to the Employees' Stock Subscription Plan as authorized at the special meeting of Stockholders of the Company held on July 28, 1930.

The American Tobacco Company

Accompanying the notice of the special Stockholders' meeting of July 28, 1930, sent to all stockholders, was a copy of a proposed Employees' Stock Subscription Plan to be submitted to the meeting, also a letter from George W. Hill, President of the Company, containing the following:

[fol. 126] "Your Board of Directors takes pleasure in reporting that, notwithstanding the high record of last year as reflected in the Treasurer's report submitted to you at the last Annual Meeting, your Company's business during the first five months of the current year has surpassed all previous records for corresponding periods. The net profits for the first five months of the current year has surpassed all previous records for corresponding periods. The net profits for the first five months of this year, as shown by the books of the Company, after allowing for bond interest and preferred dividends, show an increase of more than 100% over the figures for the corresponding period of last year, and the outlook for the remainder of the year 1930 is very encouraging. This situation enables us to take those steps in the interest of our Stockholders which we predicted in 1929."

There followed a reference to the proposed split-up of shares of Common Stock, including Common Stock B, and the necessary accompanying change in the voting power of the preferred stock. The letter then continued:

"There will also be submitted to the Stockholders at this special meeting a plan for the issuance and sale of shares of Common Stock B of the Company to employees and persons actively engaged in the conduct of the Company's business. A copy of the plan is enclosed. I am certain that every Stockholder will agree that it is to the Company's [fol. 127] interest that the organization which has made possible the great success which the Company has enjoyed during the past few years should be given every encouragement to continue in the Company's employ. It is the purpose of this plan, conforming with the policies of many

large business enterprises, to offer inducements by way of stock ownership in the Company to the men who have made that success possible, so that the Company and its Stockholders will have the assurance of their continued services in carrying the business forward with maximum enthusiasm and efficiency."

The Plan

The Plan, which, as above stated, was printed in full and attached to the notice of the special stockholders' meeting of July 28, 1930, mailed to all stockholders, stated that its purpose was

"to accord to such employees of The American Tobacco Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of stock of the Corporation."

The Plan provided that the stock to be allotted for subscription was to be unissued Common Stock B which might be authorized at the same meeting of stockholders at which the Plan might be approved, but it was provided that there should at no time be any issuance of shares under the Plan [fol. 128] when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

The Plan further provided that the Board of Directors might at such time or times as it might determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription to employees of the Corporation and/or its subsidiaries and to those actively engaged in the conduct of its or their business in such amounts and proportions, to such persons, at such prices, not less than the par value of the shares allotted, payable in full or in instalments, and upon such other terms and conditions, all as should be determined with respect to each offering of stock to each individual, pursuant to authority to be granted by the Board of Directors to the President for such purpose.

The Plan further provided that no stock was to be delivered until fully paid for, but dividends were to be credited to the subscriber on account of payments agreed to be made by him in the purchase of such stock.

The Plan further provided that no employee or person actively engaged in the conduct of the business of the Corporation or its subsidiaries was to be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

[fol. 129] Approval Granted by Stockholders

The response of the Stockholders to the various proposals contained in the notice and in the President's letter was one of overwhelming approval. The attendance of Stockholders at the meeting in person and by proxy was approximately eighty per cent of the total outstanding stock, this being the largest amount of stock ever represented at a Stockholders' meeting of the Company. Both on the vote for the proposed changes in the capital structure and on the vote for the Employees' Stock Subscription Plan, the vote far exceeded the two-thirds required by the laws of New Jersey. The total of votes of Preferred, Common and Common B shares voting in favor of the Plan was 2,228,488 and a total of 2,112 shares voted against. In other words, approximately 99.991% of the stock present in person or by proxy voted in favor of the Employees' Stock Subscription Plan and approximately 80% of the total outstanding stock of the Company approved the Plan.

Results Achieved by Present Management and Operating Personnel

Your Board of Directors deemed it advisable to wait until the results of the Company's operations for the entire year 1930 were known before taking any action to put the Employees' Stock Subscription Plan into effect. By the latter part of January, 1931, it was apparent that the Company had both in volume of business and net profits far surpassed, in the year 1930, the results of any previous year of its history, including the period before the break-up [fol. 130] of the old American Tobacco Company as a result of the Government's suit.

For instance in 1911, during the first eleven months of which the Company was still the owner of all the brands

and stocks in other companies which it was subsequently compelled to dispose of under the final decree in the Sherman Law case, the earnings of the Company for its preferred and common stock was $30,633,314. After the dissolution under the Court decree and the resulting loss of most of the brands and subsidiary companies, the net earnings of your Company dropped, until in 1915 they amounted to only $11,234,581. In December, 1925, Mr. George W. Hill became President of the Company and proceeded to build up the present management. Prior to that date the Lucky Strike Cigarette, which now constitutes the principal business of your Company, had been originated by Mr. Hill, who designed the package, including the wording, the name, the color and the shape, and Mr. Charles A. Penn, now Vice-President, who worked out the blend.

The results achieved under the present management speak for themselves.

Sales of Cigarettes

Year	Proportion of total cigarette production (based on U. S. Internal Revenue figures)
1926	20.14%
1927	22.44%
1928	29.59%
1929	34.16%
1930	38.10%

[fol. 131] The Government figures for the year 1930 compared with 1929 show an increase in total cigarette production of Five hundred eighty-six million seventy thousand (586,070,000) cigarettes. The Lucky Strike Cigarettes alone by actual sales* for the year 1930 show an increase

*In view of public statements which have been brought to our attention, apparently designed to detract from the tremendous success of Lucky Strike Cigarettes, to the effect that the statements of Lucky Strike sales published by The American Tobacco Company include exports, we will take this opportunity of stating without qualification or reservation that public statements of Lucky Strike sales represent only domestic sales and are therefore directly comparative with the United States Revenue figures.

over 1929 of more than Six billion two hundred nineteen million (6,219,000,000) cigarettes, a greater increase by more than Five billion five hundred million (5,500,000,000) cigarettes than shown by all cigarettes combined.

The net earnings of the Company and dividends are also indicative of what has been accomplished for the stockholders by the management:

Net Earnings of the Company After Deducting All Expenses for Management, Taxes, Depreciation, etc.

Year	Amount
1924	$20,839,694
1925	22,288,596
1926	22,549,094
1927	23,309,689
1928	25,066,299
1929	30,231,348
1930	43,345,370

[fol. 132] Dividends on Common Stock and Common Stock B

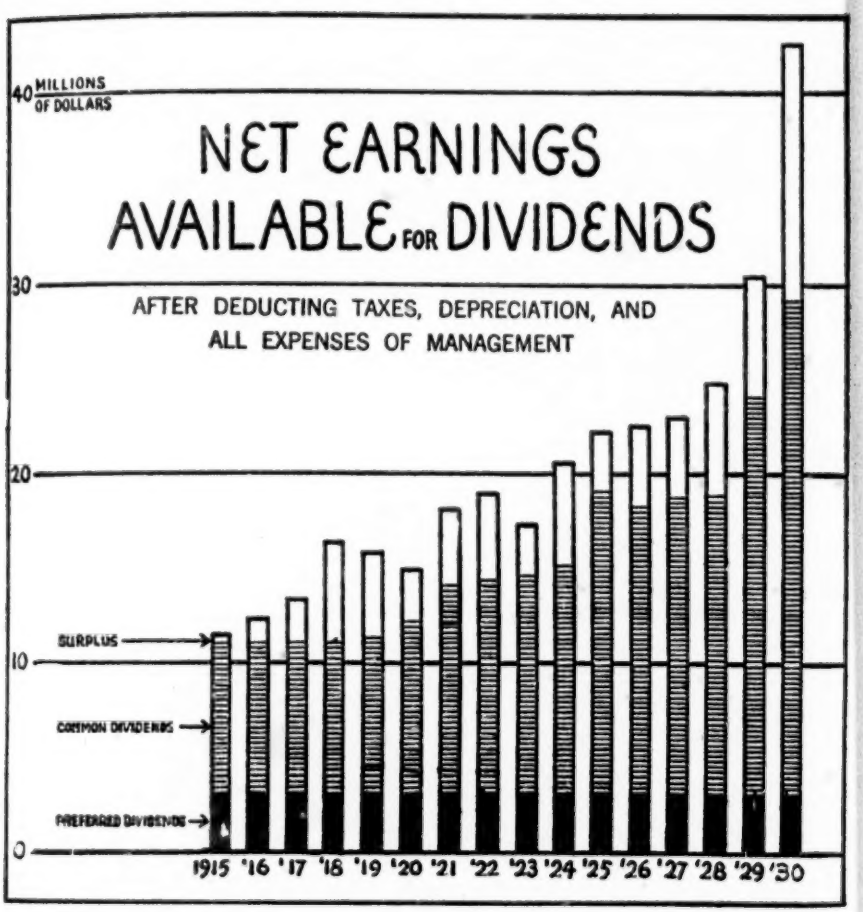
Year	Amount
1924	$12,202,675
1925	16,109,922
1926	15,622,486
1927	15,622,856
1928	15,623,172
1929	21,091,536
1930	29,293,983

In addition, the Company has paid dividends on the preferred stock each year of $3,161,982.

The following graphic chart shows, by years, the net earnings of the Company available for dividends from 1915 to 1930 inclusive, after deducting taxes, depreciation and all expenses of management, and the second chart (appearing on page 7) shows, by years, the amounts earned per share on Common and Common B Stock during the same period.

(Here follows chart, side folio 133)

Exhibit C.


40
MILLIONS
OF DOLLARS
NET EARNINGS
AVAILABLE FOR DIVIDENDS
AFTER DEDUCTING TAXES, DEPRECIATION, AND
ALL EXPENSES OF MANAGEMENT
30
20
10
0
SURPLUS
COMMON DIVIDENDS
PREFERRED DIVIDENDS
1915 '16 '17 '18 '19 '20 '21 '22 '23 '24 '25 '26 '27 '28 '29 '30

[fol. 134] Earnings for 1930—A Year of Acute Depression

It will be noted that the earnings of the Company for the year 1930 are $43,345,370, an increase of more than 43% over the year 1929, and that the dividends paid in 1930 upon the Common Stock and Common Stock B alone amounted to $29,293,983.

This was in the year of probably the worst depression that this country has ever experienced. Reported statistics show that 1,326 banks failed during the year 1930; that 782 corporations of public ownership reduced their cash dividends on common stocks and 470 corporations reduced their cash dividends on preferred stock, whereas your Company paid in that year upon its Common Stock and Common Stock B, dividends substantially exceeding the total earnings of the Company on its Common Stock in 1911, when it controlled a large part of the world's tobacco industry.

Comparison With Other Tobacco Companies

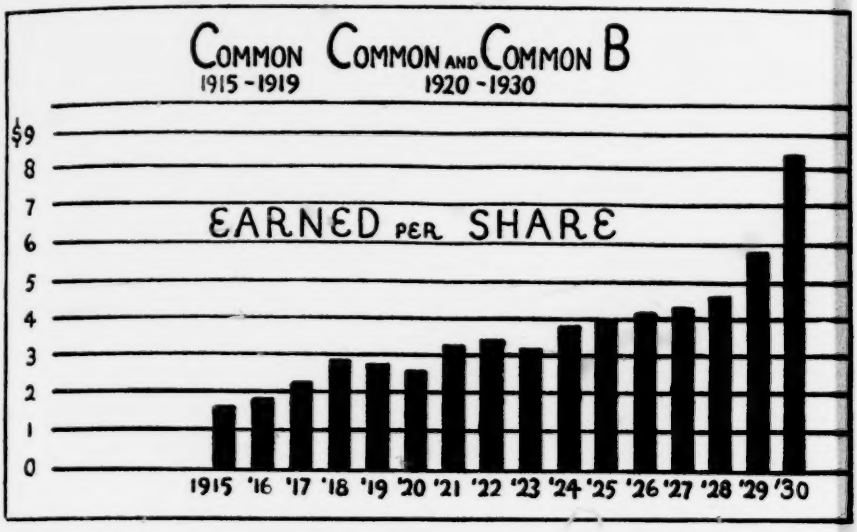
A comparison of the earnings of your Company with those of its principal competitors is also illuminating.

The total increase in earnings available for stockholders (after deducting bond interest, etc.) for the year 1930 compared with 1929, of the three principal competitors of your Company, was $6,309,039, whereas your Company's increase in such earnings for 1930 compared with 1929 was $13,116,165. In other words, your Company increased its earnings by more than twice as much as all three of its principal competitors combined.

The total earnings of those three competitors for the year 1930 (deducting bond interest, etc.) was $61,873,343, whereas such earnings of your Company for that year amounted to $43,294,769. In other words, for every dollar made for their stockholders in 1930 by the three competitors combined, your Company earned seventy cents.

(Here follows chart, side folio 135)

Exhibit C.


COMMON
1915 - 1919
COMMON AND COMMON B
1920 - 1930
$9
8
7
6
5
4
3
2
1
0
EARNED PER SHARE
1915 '16 '17 '18 '19 '20 '21 '22 '23 '24 '25 '26 '27 '28 '29 '30

[fol. 136] Stockholders' Action in Line With Modern Corporate Business Practice

It is obvious that such outstanding success as is pictured in the foregoing brief outline was not the result of accident or good fortune but was based upon able leadership and the teamwork of a well-knit, efficient organization.

It is strikingly apparent that nothing could be more vital to the interests of the Stockholders of this Company than the creation of a definite incentive to the management and organization which has accomplished the remarkable achievement above outlined and thus stimulate it to even greater efforts in the future. This is definitely in line with accepted modern corporate business practice. The action of the Stockholders at the meeting in July, 1930, was intelligently directed to that end in authorizing, as they did by a great majority, the Employees' Stock Subscription Plan. The object of that Plan was, by offering additional compensation for future services by way of stock ownership in the Company, to furnish the necessary stimulus and incentive to the employees and those engaged in the conduct of the Company's business who had achieved such remarkable results for the Stockholders in the past, and thus stimulate and encourage them to continue and even better those results. It was with recognition of these principles underlying such action of the Stockholders that the Directors in January, 1931, took up the task of putting into effect the Plan thus authorized by the stockholders.

[fol. 137] Formula Developed and Put Into Operation

Approximately 312,000 shares of Common Stock B were available for allotment under the Plan. It seemed advisable to allot only about one-sixth of these shares at this time, leaving the balance for future use. Accordingly, 56,712 shares were allotted to employees.

It was next necessary to select the employees who were to participate in the plan. After careful consideration it was the opinion of the Directors that the maximum beneficial results from the Plan would be obtained by extending it to a list of five hundred and thirty-five employees, beginning with the President and going down to and including sub-assistants in factory departments. As, with one excep-

tion, all of your Directors are executives engaged in carrying on the business of your Company, this list included all but one of the Directors. No Director voted upon his own allotment.

Inasmuch as the comparative value of employees to a business concern is almost invariably to be determined from the salaries or wages respectively paid to them, it seemed wise to adopt, as a general formula in allotting stock, a fixed ratio to the cash compensation which the Company was paying to each participant, adjusting the exact amount on the merits of each particular case. For this purpose the heads of all departments prepared lists of the employees who were to participate, rating all such employees in their respective departments on the basis of what was deemed to be their value to the Company, 100% representing the highest possible rating. The subscription price of [fol. 138] stock allotted under the Plan was fixed at $25 per share. To each employee rating 100%, shares were allotted having a par value of one-third of his annual rate of compensation during the year 1930. Employees rating less than 100% were allotted a smaller amount of stock.

Article XII of the By-Laws

The compensation so taken into account in making allotments under the Plan, included money compensation of every kind, whether fixed salary or contingent compensation. It therefore included, as to the President and the five Vice-Presidents, compensation under Article XII of the by-laws adopted by vote of the Stockholders of the Company in 1912.

That by-law is believed to have been originally suggested by the late Mr. James B. Duke, and we understand that by-laws similar in principle and percentage, although differing in form and method of application, were, at his instance, adopted by most of the other companies that emerged from the old American Tobacco Company as a result of the court decree in 1911.

That by-law provided in effect that in any year beginning with the year 1912 in which the net profits earned by The American Tobacco Company in the tobacco business exceeded $11,369,000 (to wit, $8,222,245.82, the amount of net profits earned in 1910 by the businesses retained by

The American Tobacco Company under the Federal decree in the anti-trust case, plus approximately $3,147,000, annual dividends on the 6% Preferred Stock of the Company) the Treasurer of the Company was to pay an amount [fol. 139] equal in the aggregate to 10% of such excess of net profits to the President and the five Vice-Presidents of the Company. One-quarter, or 2½%, of such amount was to go to the President and the remaining 7½% to be divided among the five Vice-Presidents. Such payments were to be as salary for any such year, in addition to the fixed salaries of said officers.

It was provided that the net profits for the purposes of such by-laws should consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as should be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6% dividends on $52,459,400 of its 6% preferred stock, to which profits should be added, or from which profits should be deducted, as the case might be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year, of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Company, Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited. It is to be noted that although the Company ordinarily has income from sources, other than those included in this by-law —such, for instance, as that from the American Cigar Company and certain other Subsidiaries—the income from such other sources is excluded and this compensation is restricted and based only upon the profits from sources included in the language of the by-law. It will also be noted [fol. 140] that this compensation, based upon the net profits of the Company, was adopted by the Stockholders in 1912 and is in no wise dependent on any vote of the Directors or action of officers. It is, as it states itself to be, a "salary for the year, in addition to the fixed salary of each of said officers." The statement of net profits shown on the Company's annual reports to stockholders represents the amount of net profits remaining after the deduc-

tion of such compensation, as well as all expenses of management of whatsoever character, including depreciation and obsolescence and also after deducting taxes, of which over One hundred and fifty million dollars ($150,000,000) were paid to the United States Government alone for the year 1930.

The sound common sense underlying Mr. Duke's plan of contingent compensation to executives is amply demonstrated by the great advances made by the several companies to which it was applicable, but in no case has it been more completely justified than in that of The American Tobacco Company as exemplified by its progress and brilliant success.

Arrangements with Employees Participating under the Plan

The arrangements for the sale of stock to employees under the Plan have been carefully safeguarded in order that they might be fair and just both to the Company and its employees. A copy of the form of agreement made with employees participating in the Plan forms a part of this statement. All dividends upon the stock are credited upon the purchase price. No stock is to be delivered to the employee until fully paid for. The 56,712 shares of stock [fol. 141] which have been allotted are by way of additional compensation for services to be rendered during the year 1931, and will not in any event be delivered until the end of the year. An employee whose connection with the Company is severed during the year 1931 for any reason, except his death, loses his right to the stock, although such loss may be waived in whole or in part by the Trustees on behalf of the Company, it being contemplated that special circumstances might exist in some cases for the mitigation of the severity of this rule. If any employee dies during the year, his allotment will be reduced based on the proportion of the year elapsing up to his death.

Each employee to whom stock was allotted under the Plan received the following letter from the President of the Company:

"January 30, 1931.

"I have the pleasure of saying to you, that, under authority granted by Stockholders on July 28, 1930, there

has been allotted to you by the Directors of this Company, — shares of American Tobacco Company 'B' Stock, to be sold to you at par—$25 per share and that in the course of a few days, you will receive from Mr. Thos. R. Taylor, Vice-President of the Company, the papers covering this sale and information regarding the details thereof.

"My purpose in writing you this letter, is to definitely say to you, that, in my opinion, the Stockholders have been generous in this recognition that they permit the Directors to make of your service and to point out to you that the [fol. 142] allocation has been made to you for the purpose of still further stimulating your efforts in the Company's behalf.

"Whether you are in charge of a factory or a Department, or whatsoever of our activities come under your direction, the allotment of stock has been made to you, based upon what the Officers of this Company deemed your efficiency to be. It is not given to you for services that have heretofore been rendered; it is not given to you in the nature of a bonus. The purpose of the allotment of stock, is solely to urge upon you further interest in the development of your Company's affairs.

"If you have been economical, industrious, resourceful and energetic in your attention to Company matters entrusted to your care (and to have been allocated the above amount of stock, you must have shown some of these virtues), I desire to emphasize to you that the Company will expect from you even greater application, even greater interest in the future than you have shown in the past.

"While I have no authority to make any commitment, it is my hope that sometime in the future, the Board will again be in a position whereby they may recognize the services that you will perform and the merit and value that you will deliver to your Company. I desire to assure you that if that time again comes, such recognition will be based upon the merits that you demonstrate.

"I do not want you to feel that this liberal action of your Company has placed you in the position whereby your services become, in your opinion, indispensable. I want [fol. 143] you to realize that you must go forward in your striving and that, indeed, although now your efforts have been well recognized, recognition in the future will depend upon services rendered in the future and that if such recog-

nition does not come to you, should it come to others, it might well be that the position that you fill could be more ably filled by another.

"I congratulate you upon the recognition accorded you by the Board of Directors and in all friendship I send you this letter of encouragement, of frankness and good-will.

Cordially yours, George W. Hill, President."

Although the Company has always had an exceedingly hardworking and loyal organization, it has been demonstrated, even in the few weeks that have elapsed since the allotment of stock to employees under the Plan, that the tangible indication of the Company's appreciation of their work, evidenced thereby, had made itself felt and is evidenced in the increased enthusiasm of employees on their jobs, this being true in every branch of the organization.

There follows herewith a detailed statement of the shares of stock allotted to each individual employee to whom stock has been allocated. The names of the individuals are omitted for organization reasons.

President	13,440
Vice-Presidents	16,685

[fol. 144]

1	980	20	200
2	665	21	200
3	560	22	200
4	400	23	200
5	330	24	200
6	260	25	187
7	260	26	165
8	260	27	160
9	260	28	160
10	260	29	160
11	250	30	160
12	250	31	160
13	250	32	150
14	240	33	150
15	240	34	135
16	220	35	130
17	220	36	130
18	210	37	130
19	200	38	130

39	125	81	60
40	125	82	60
41	125	83	60
42	125	84	60
43	120	85	60
44	110	86	60
45	110	87	60
46	100	88	60
47	100	89	60
48	100	90	60
49	100	91	60
50	100	92	60
51	100	93	55
52	100	94	55
53	100	95	50
54	100	96	50
55	100	97	50
56	100	98	50
57	90	99	50
58	85	100	50
59	85	101	50
60	80	102	50
61	80	103	50
62	75	104	50
63	75	105	50
64	75	106	50
65	75	107	50
66	75	108	50
67	75	109	50
68	75	110	50

[fol. 145]

69	75	111	50
70	75	112	50
71	75	113	50
72	75	114	50
73	75	115	50
74	75	116	50
75	70	117	50
76	65	118	50
77	65	119	50
78	65	120	50
79	60	121	50
80	60	122	50

123 50
124 50
125 50
126 50
127 50
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135 50
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[fol. 146]

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203 35
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206 35

[fol. 147]

207	35	247	30
208	35	248	30
209	35	249	30
210	35	250	30
211	35	251	30
212	35	252	30
213	35	253	30
214	35	254	30
215	35	255	30
216	35	256	30
217	35	257	30
218	35	258	30
219	35	259	30
220	35	260	30
221	35	261	30
222	25	262	30
223	35	263	30
224	35	264	30
225	35	265	30
226	35	266	30
227	35	267	30
228	35	268	30
229	35	269	30
230	35	270	30
231	35	271	30
232	35	272	30

[fol. 148]

233	35	273	30
234	35	274	30
235	35	275	30
236	35	276	30
237	35	277	30
238	35	278	30
239	35	279	30
240	35	280	30
241	30	281	30
242	30	282	30
243	30	283	30
244	30	284	30
245	30	285	30
246	30	286	30

287	30	329	25
288	30	330	25
289	30	331	25
290	30	332	25
291	30	333	25
292	30	334	25
293	30	335	25
294	30	336	25
295	30	337	25
296	30	338	25
297	30	339	25
298	30	340	25

[fol. 149]

299	30	341	25
300	25	342	25
301	25	343	25
302	25	344	25
303	25	345	25
304	25	346	25
305	25	347	25
306	25	348	25
307	25	349	25
308	25	350	25
309	25	351	25
310	25	352	25
311	25	353	25
312	25	354	25
313	25	355	25
314	25	356	25
315	25	357	25
316	25	358	25
317	25	359	25
318	25	360	25
319	25	361	25
320	25	362	25
321	25	363	25
322	25	364	25
323	25	365	25
324	25	366	25
325	25	367	25
326	25	368	25
327	25	369	25
328	25	370	25

371	25	411	20
372	25	412	20
373	25	413	20
374	25	414	20
375	25	415	20
376	25	416	20
377	25	417	20
378	20	418	20
379	20	419	20
380	20	420	20
381	20	421	20
382	20	422	20
383	20	423	20
384	20	424	20
385	20	425	20
386	20	426	20
387	20	427	20
388	20	428	20
389	20	429	20
390	20	430	20
391	20	431	20
392	20	432	20
393	20	433	20
394	20	434	20
395	20	435	20
396	20	436	20
397	20	437	20
398	20	438	20
399	20	439	20
400	20	440	20
401	20	441	20
402	20	442	20
403	20	443	20
404	20	444	20
405	20	445	20
406	20	446	20
407	20	447	20
408	20	448	20

[fol. 150]

409	20	449	20
410	20	450	20

451	20	491	15
452	20	492	15
453	20	493	15
454	20	494	15
455	20	495	15
456	20	496	15
457	20	497	15
458	20	498	15
459	20	499	15
460	20	500	15
461	20	501	15
462	20	502	15
463	20	503	15
464	20	504	15
465	20	505	15
466	20	506	15
467	20	507	15
468	20	508	15
469	20	509	15
470	20	510	15

[fol. 151]

471	20	511	15
472	20	512	15
473	20	513	15
474	20	514	15
475	20	515	15
476	20	516	15
477	20	517	15
478	20	518	15
479	20	519	15
480	15	520	15
481	15	521	15
482	15	522	15
483	15	523	10
484	15	524	10
485	15	525	10
486	15	526	10
487	15	527	10
488	15	528	10
489	15	529	10
490	15		

[fol. 152] Subscription agreement for stock offered for subscription under employee's stock subscription plan of the American Tobacco Company, 1931, between the company, the respective employees, and Junius Parker, Esq., and Guaranty Trust Company of New York, Trustees

New York, N. Y., January 31, 1931.

To —— ——:

Under the Employees' Stock Subscription Plan approved at a Special Stockholders' Meeting of The American Tobacco Company (hereinafter refered to as the "Company") on July 28, 1930, there have been allotted to you (you are hereinafter referred to as the "Participant" and you and others subscribing for stock now offered under said Plan are hereinafter collectively referred to as "Participants"), for subscription and purchase by you, by way of additional compensation for services to be rendered by you to the Company and/or its subsidiaries to and including December 31, 1931, — shares (hereinafter called the "Stock") of the Common Stock B of the Company upon the following terms and conditions, to wit:

1. Price.—The Stock is offered to the Participant for subscription at $25 per share.

2. Trustees.—An agreement has been entered into by the Company dated January 30, 1931 (a copy of which is hereto annexed marked Schedule "1"), appointing the [fol. 153] undersigned Guaranty Trust Company of New York and Junius Parker, Trustees. The Participant hereby approves and ratifies said agreement and agrees to be bound by the terms thereof and consents and agrees that the Trustees and the Company may take any action thereby authorized or permitted.

The word "Trustees" when used herein refers to the said Guaranty Trust Company of New York and Junius Parker as such Trustees and/or their respective successor and/or successors as such Trustees.

3. Loan, Pledge of Stock, etc.—For the purpose of purchasing from the Company and carrying the stock allotted to and subscribed for by Participants under said Plan

until the same has been paid for by the respective Participants, a loan or loans have been or will be negotiated by the Trustees, in an aggregate amount equal to $25 per share on the number of shares of Common Stock B of the Company allotted to and subscribed for by Participants. The proceeds of such loan or loans shall be used to purchase from the Company at $25 per share, the stock allotted to and subscribed for by Participants. Said Trustees shall accept payments from the Participants and make delivery of the Stock in accordance with the terms hereof. The Trustees shall have the right to make said loan or loans and any loan or loans in renewal or substitution therefor in whole or in part, on such terms and conditions, at such rate of interest and otherwise as in their uncontrolled discretion they may deem advisable, and shall have the right to pledge as security for such loan and/or any [fol. 154] loan obtained by them in renewal or substitution therefor in whole or in part, all or any part of any stock subscribed for by the Participants (including any stock dividends thereon and any stock and/or other securities purchased by the Trustees on the exercise of rights as provided herein) as well as the Subscription Agreements of Participants, provided that any such stock subscribed for by Participants and any stock dividends thereon and stock and other securities purchased under rights issued in connection therewith, and any such Subscription Agreement of any Participant, so pledged, shall be withdrawn by the Trustees from such pledge when payment in full of the purchase price of such stock, including interest, shall have been made by such Participant subscribing therefor.

4. Interest.—The Participant shall pay interest to the Trustees on all unpaid balances of the purchase price, at such rate not in excess of six per centum per annum as the Trustees may fix from time to time.

5. Terms of Payments.—The purchase price shall be paid by the Participant to the Trustees in quarterly instalments of $1.25 per share on the first days of March, June, September and December, which payments will be applied against the purchase price and interest thereon.

The quarterly cash dividends and extra cash dividends, if any, paid on the Stock and on stock dividends paid on

the Stock and on stock purchased under rights issued with respect thereto shall be applied by the Trustees to the pay-
[fol. 155] ment of such purchase price and interest. As long as cash dividends on the Common Stock B at or in excess of the present rate of $1.25 per share per quarter are paid by the Company, such application thereof upon the purchase price and interest shall constitute compliance with the above requirement for quarterly payments. The Participants shall have the right to make additional payments on the purchase price at any time and from time to time until the purchase price of the Stock and interest thereon is paid in full.

6. Place of Payment.—All payments are to be made in New York funds to Guaranty Trust Company of New York, 140 Broadway, New York, N. Y.

7. Delivery of Stock.—The stock certificates shall not be delivered by the Trustees to the Participant until the purchase price of the Stock and all interest accrued thereon shall have been paid in full and in any event shall not be delivered to the Participant until after December 31, 1931, nor shall the Participant be or be deemed to be the owner of the Stock or of any stock dividends thereon or of stock or other securities purchased under rights issued in connection therewith, until he becomes entitled to delivery thereof under the terms of this Subscription Agreement and the stock certificates and other securities, if any, are delivered to him.

8. Voting Rights.—All voting rights, if any, on the Stock and on stock dividends paid on the Stock and on stock purchased under rights issued with respect thereto are to be vested in the Trustees or their successors until the pur-
[fol. 156] chase price of the Stock and all interest accrued thereon is paid in full.

9. Stock Dividends.—Any stock dividends which may be paid by the Company upon the Stock shall be added to and deemed to be a part of the Stock, and any cash dividends paid thereon shall be applied against the purchase price of the Stock and interest. When payment in full of the purchase price of the Stock and all interest accrued thereon shall have been made by the Participant and he shall have

become entitled to the delivery thereof pursuant to the terms hereof, such stock dividends shall be delivered to the Participant at the same time that delivery is made of the Stock subscribed for hereunder. The words "stock dividends paid on the Stock" or equivalent expressions when used herein shall be deemed to include stock dividends on stock received as stock dividends and stock dividends on stock purchased on the exercise of rights issued in connection with the Stock. If any recapitalization of the Company shall occur effecting a change of the Common Stock B into a different number of shares or into shares of any other class or otherwise, the shares covered by this Subscription Agreement shall be correspondingly changed into shares resulting from such change.

10. Rights.—In the event that before delivery of the Stock to the Participant, the Company issues rights to the holders of Common Stock B to purchase any new or additional issue of stock of the Company or other stock or securities, the Trustees may, at their option, as to the rights so issued with respect to the Stock:

[fol. 157] (a) exercise such rights and purchase the stock or other securities offered thereunder, for the benefit of the Participant, in which case the amount of purchase price payable by the Participant hereunder shall be increased by the amount of the cost of the stock or other securities purchased by the Trustees under such rights for the account of the Participant, plus interest; when payment in full of the purchase price of the Stock as so increased and all interest accrued thereon, shall have been made and the Participant shall have become entitled to the delivery of the Stock pursuant to the terms hereof, such stock or other securities so purchased under such rights for the account of the Participant shall be delivered to the Participant at the same time that delivery is made of the Stock subscribed for hereunder; or

(b) sell such rights and apply the proceeds of such sale upon the purchase price of the Stock.

The Trustees may, but shall not be required to, permit the Participant to determine in each instance whether he desires the rights issued with respect to the Stock exercised or sold.

The words "rights issued with respect to the Stock" or equivalent expressions when used herein shall be deemed to include rights issued with respect to stock dividends paid on the Stock and rights issued with respect to stock purchased by the Trustees on the exercise of rights issued with respect to the Stock.

The words "purchase price of the Stock" when used herein shall be deemed to refer to the purchase price as increased as provided in subdivision (a) of this Paragraph 10.

[fol. 158] 11. Discharge or Resignation; Default; Etc.—In the event that

(a) prior to December 31, 1931, the connection of the Participant with the Company or any subsidiary, as the case may be, is severed by discharge either with or without cause, or resignation, or in any manner other than death, so that he is no longer in the employ of the Company or one or more of its subsidiaries, nor actively engaged in the conduct of the business; or

(b) at any time before the purchase price of the Stock is paid in full default is made in the making of any payment due by the Participant or his personal representatives hereunder and such default continues for thirty days after written notice thereof is mailed to him by the Trustees by registered mail addressed to the Participant or his personal representatives at his address as set forth below his signature on the Acceptance attached hereto; or

(c) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, any assignment, transfer, hypothecation or pledge of, or attempt to assign, transfer, hypothecate or pledge, the Stock of any part thereof, or any stock dividends thereon or any stock or other securities purchased by the Trustees on the exercise of rights issued with respect thereto, or any interest of Participant therein or in this agreement, is made by or on behalf of the Participant or his personal representatives; or

[fol. 159] (d) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, the Stock or any part hereof, or any stock dividends thereon, or any stock or other securities

purchased by the Trustees on the exercise of rights issued with respect thereto, or any interest of the Participant therein or in this agreement, is sold or attempted to be sold by process of law; or

(e) at any time before the Participant become entitled under the terms hereof to delivery of the certificates for the Stock, the Participant becomes insolvent or bankrupt; then in any such event this Subscription Agreement of all rights of the Participant hereunder shall forthwith be subject to cancellation at the election of the Trustees, to be evidenced by written notice mailed to the Participant at the address set forth below his signature on the Acceptance attached hereto, and in the event of such cancellation the Participant shall have no further right, interest or claim of any kind hereunder, or in or to the Stock or any stock or other securties referred to herein or to which this agreement may relate, and shall not be entitled to purchase nor to the delivery of any stock or other securities hereunder, notwithstanding that there may have been paid by him or credited to him from dividends or otherwise, part or all of the purchase price of the Stock, excepting only that the Participant shall be entitled to be reimbursed by the Trustees for the amount of money, if any, which he shall have paid out of pocket to the Trustees on account [fol. 160] of his subscription hereunder, plus interest on such amount at such rate not to exceed six per centum per annum as the Board of Directors of the Company may determine, but such reimbursement to him shall not include nor shall he have any right, interest or claim of any kind in or to any cash dividends on the Stock or on any stock received by the Trustees as stock dividends or purchased under rights, or in or to any other cash, stock, securities or other property which may have been or may be received by the Trustees in any manner hereunder, the rights of the Participant in the event of such cancellation being limited strictly to reimbursement of his out of pocket payments and interest thereon as aforesaid. The Trustees may in their uncontrolled discretion waive such right of cancellation as to all or any part of the Stock subscribed for by the Participant, including stock dividends and stock or other securities purchased under rights, if any.

12. Death.—No rights of the Participant hereunder shall survive the death of the Participant, except as expressly hereinafter provided in this Paragraph 12.

(a) In the event of the death of the Participant prior to December 31, 1931, while in the employ of the Company and/or of a subsidiary or actively engaged in the conduct of the business of the Company and/or of a subsidiary and while this agreement is in effect, his personal representatives shall be entitled to purchase so much of the Stock (and a pro rata amount computed on the same ratio, of [fol. 161] any stock dividends issued thereon and any stock or other securities purchased under rights issued with respect thereto up to and including the date of such death), as shall bear the same ratio to the total number of shares of the Stock subscribed for by him (exclusive of stock dividends issued thereon and stock or other securities purchase- under rights as aforesaid) as the number of days which shall have elapsed after January 1, 1931 to the date of his death bears to three hundred and sixty-five, at a pro rata of the purchase price of the Stock subscribed for by him, determined on the same ratio (plus the cost of the pro rata amount, if any, computed on the same ratio, of stock or other securities purchase- under rights issued with respect to the stock, as aforesaid), with credit of any cash dividends paid on such pro rata amount of stock to such date, also determined on the same ratio, and shall be entitled to continue to make payments in the manner hereinabove provided until such purchase price of such pro rata amount of stock and any interest accrued thereon shall have been paid in full, when such personal representatives shall be entitled to receive such pro rata amount of stock determined as aforesaid. In case such personal representatives of such deceased Participant do not desire to purchase such pro rata amount of stock, they may, within six months after such death, request the Trustees to sell such pro rata amount of stock, determined as aforesaid, at the then market price, and the proceeds of such sale (after deducting any unpaid balance of the purchase price due on such pro rata amount of stock, together with interest accrued thereon) shall be paid, if any, to such personal representa- [fol. 162] tives. The personal representatives of a deceased Participant shall be conclusively presumed to have

elected to purchase such pro rata amount of stock, under the foregoing provisions of this subdivision (a), unless they make such request for sale within six months after the death of such Participant.

(b) In the event of the death of the Participant on or after December 31, 1931 and while this agreement is in effect, his personal representatives shall have the right to continue to make payments to the Trustees in the same manner and on the same terms applicable hereunder to the Participant during his lifetime, until the purchase price of the Stock and any interest accrued thereon shall have been paid in full, when such personal representatives shall be entitled to receive the Stock, together with any stock dividends thereon and stock or other securities purchased under rights, if any. In case the personal representatives shall not desire to continue to make such payments, they may, within six months after such death, request the Trustees to sell the Stock, including any stock dividends and any stock or other securities purchased under rights, if any, at the then market price, and the proceeds of such sale (after deducting any unpaid balance of the purchase price due on the Stock, together with interest) shall be paid, if any, to such personal representatives. The personal representatives of a deceased Participant shall be conclusively presumed to have elected to continue to make such payments and to purchase the Stock under the foregoing provisions of this subdivision (b) unless they make such request for sale within six months after the death of such Participant.

[fol. 163] 13. In any case in which an amount of stock deliverable by the Trustees under this agreement or to which this agreement may at any time relate includes a fractional share, the Trustees shall have the discretionary right to adjust such fraction either by a cash payment or by sale or purchase of such fraction, or in such other manner as they in their discretion may determine.

14. The Stock subscribed for hereunder has been allotted to the Participant as additional compensation as aforesaid for services to be rendered by him, and neither this agreement nor the Stock (including any stock dividends thereon and any stock or other securities purchased by the Trustees on the exercise of rights issued in connection therewith)

nor any of the rights of the Participant nor of his personal representatives hereunder, shall be subject to sale, transfer, assignment, pledge or hypothecation by him or his personal representatives until the Participant shall have become entitled to and shall actually have received delivery of the Stock certificates under the terms hereof.

15. The Trustees may construe any of the provisions of this Subscription Agreement, and any construction placed upon any provision hereof by the Trustees in good faith shall be binding upon the Participant and his personal representatives, and upon the Company.

16. In addition to any other rights of cancellation provided herein, the Trustees shall have the discretionary right at any time, at the request of the Participant or his [fol. 164] personal representatives, to cancel the subscription hereby evidenced in whole or in part, upon such terms as the Trustees may determine.

17. The Trustees at their option in any instance before exercising any discretion vested in them hereunder, may consult with or act upon the advice of the officers or Board of Directors of the Company, and the action of the Trustees in relying or acting upon such advice and decision shall be deemed to be an exercise of their discretion within the terms hereof.

If you desire to avail yourself of this offer, please fill out and sign the acceptance of this Subscription Agreement on the enclosed duplicate, and forward the same to Guaranty Trust Company of New York, 140 Broadway, New York, N. Y., attention of Trust Department, and this Subscription Agreement and such Acceptance will thereupon constitute an agreement on the terms hereinabove set forth.

Guaranty Trust Company of New York, by —— ——, Vice-President. —— ——, Trustees. The American Tobacco Company, by —— ——, Vice-President.

[fol. 165] Acceptance of Subscription Agreement

February —, 1931.

Guaranty Trust Company of New York, Junius Parker, trustees under agreement of January 30, 1931

Dear Sirs: I hereby subscribe for — shares of the Common Stock B of The American Tobacco Company in accordance with the terms and conditions outlined in the foregoing Subscription Agreement.

Yours very truly, Signature: —— ——, Street: ——, Town or City: ——, State: ——.

[fol. 166] Schedule I

Agreement made this 30th day of January, 1931, between The American Tobacco Company, a New Jersey corporation, having an office at No. 111 Fifth Avenue, Borough of Manhattan, City and State of New York (hereinafter called the "Company"), party of the first part, and Guaranty Trust Company of New York, a corporation organized under the Banking Laws of the State of New York, having its principal office at No. 140 Broadway, Borough of Manhattan, City and State of New York (hereinafter sometimes called the "Corporate Trustee"), and Junius Parker, of 41 East 42nd Street, Borough of Manhattan, City and State of New York (hereinafter sometimes called the "Individual Trustee"), the said Guaranty Trust Company of New York and Junius Parker and their respective successors being hereinafter sometimes collectively referred to as the "Trustees"):

Whereas, the stockholders of the Company at a special meeting of stockholders held on July 28, 1930, duly approved and adopted by a vote of more than two-thirds of each class of stock, an Employees' Stock Subscription Plan, and authorized, directed and empowered the President, the Board of Directors and other proper officers of the Company to take all such steps and to do any and all acts and things authorized by the terms of said Plan, as well as any and all such other acts and things as might be necessary and proper to execute and carry out the full intent and purpose of the Plan and of such resolution of the stockholders, and

[fol. 167] Whereas, by appropriate action of the Board of Directors pursuant to said Plan, an aggregate not in excess of 56,712 shares of the Common Stock B of the Company have been offered and allotted for subscription in various respective amounts to certain employees of the Company and/or its subsidiaries and to those actively engaged in the conduct of its or their business, at $25 per share, as additional compensation for services to be rendered by them to and including December 31, 1931, and

Whereas, such respective allotments are set forth in an instrument signed by the President and attested by the Secretary or an Assistant Secretary of the Company, and delivered to the Trustees simultaneously with the execution and delivery of this agreement, and

Whereas, the terms and conditions upon which such stock is allotted to and may be purchased by such employees and persons actively engaged in the business are set forth in a Subscription Agreement to be executed by such individuals to whom stock is allotted and who subscribe therefor (the employees and persons actively engaged in the conduct of the business to whom stock is allotted under said Plan and who execute said Subscription Agreement being sometimes hereinafter referred to as "Participants"), copy of which Subscription Agreement is hereto annexed marked Exhibit "A" and made a part hereof, and

Whereas, it is deemed convenient and advisable for the purpose of executing and carrying out this Plan, that the stock so allotted for subscription under the Plan and sub-[fol. 168] scribed for by Participants be in the first instance issued to and purchased by Trustees, and that a trust be created for such purpose on the terms and conditions hereinafter contained,

Now, therefore, this indenture witnesseth:

That in consideration of the premises, the mutual covenants herein contained and of the sum of One dollar ($1) in hand paid to each of the Trustees at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties hereto hereby agree as follows:

1. Pursuant to the authority hereby and by the Subscription Agreement Exhibit "A" vested in them, the Trustees have negotiated a loan with and will borrow from Guaranty

Trust Company of New York an amount equal to $25 per share on the number of shares of Common Stock B of the Company allotted to and subscribed for by Participants executing said Subscription Agreements in the form set forth in Exhibit "A"; said loan will bear interest at a rate not in excess of six percentum (6%) per annum and will be evidenced by an instrument or loan agreement in form mutually satisfactory to the Trustees, the Company and said Guaranty Trust Company of New York and conforming to the provisions of this Agreement and of the Subscription Agreements, and will be secured by the shares of Common Stock B of the Company purchased by and delivered to the Trustees and referred to in paragraph 2 hereof and by the Subscription Agreements.

[fol. 169] 2. Promptly upon subscription therefor by Participants, the Company will sell and deliver to the Trustees and the Trustees will buy from the Company, at the price of $25 per share, the number of shares of Common Stock B of the Company, not in excess of an aggregate of 56,712 shares, allotted to and subscribed for, by Participants executing Subscription Agreements in the form set forth in Exhibit "A"; the funds to be used by the Trustees in making payment for said stock to be the proceeds of the loan referred to in paragraph 1 hereof.

3. The Trustees hereby agree that, subject to the terms of this agreement, said shares of stock of the Company will be acquired by them as aforesaid in trust and will be held and disposed of by the Trustees pursuant to the provisions of this agreement and the Subscription Agreements with Participants in the form Exhibit "A." The Company consents and agrees that the Trustees shall make delivery of the stock aforesaid in accordance with the terms of said Subscription Agreements in the form Exhibit "A" and in accordance with the terms of this Agreement.

4. The Trustees shall be empowered to borrow money for the purpose of making payment to the Company for the stock allotted to and subscribed for by Participants executing Subscription Agreements in the form of Exhibit "A," and in the event that the Company issues rights to its stockholders to purchase any new or additional issue of stock of the Company and/or other securities, the

[fol. 170] Trustees may exercise such rights and borrow additional money for such purpose. The making of the loan hereinabove referred to by the Trustees from the Guaranty Trust Company of New York is hereby ratified and approved. Any renewal of said loan or any loan made in substitution for said loan, in whole or in part, and any subsequent loan or loans may be made by the Trustees either from the Guaranty Trust Company of New York or from any other individual, firm or corporation in the discretion of the Trustees and upon such terms and conditions as to interest, maturity, security, default and otherwise, as the Trustees may from time to time in their judgment approve and agree to. The Trustees shall have authority to pledge as security for any such loan all or any part of any shares of stock then subscribed for but not paid for in full by Participants and any stock dividends paid thereon and/or any stock and/or other securities purchased under rights issued in connection therewith, as well as any Subscription Agreements executed by Participants and not performed in full, but the agreement or other instrument, evidencing any such loan, shall contain appropriate provisions so that when any Participant shall have made payment in full for the stock subscribed for by him including any stock or other securities, if any, purchased under rights issued in connection with the stock subscribed for by him and becomes entitled to the delivery thereof under the terms of the Subscription Agreement executed by him, such stock and Subscription Agreement, including any stock dividends and/or stock and/or other securities, purchased under rights, to which he may be entitled, shall be sub- [fol. 171] ject to withdrawal from the pledge of such loan; and shall also contain provisions so that any stock and/or other securities, which by reason of the death of a Participant, the cancellation of a Subscription Agreement or in any other manner whatsoever is not, under the terms of the Subscription Agreements and/or of this Agreement, to be delivered to a Participant, shall be subject to withdrawal by the Trustees from the pledge of such loan, together with any Subscription Agreement relating thereto, to the end that the Trustees may make such delivery or disposition of any such stock and/or other securities as may be authorized under the terms of the Subscription Agreements and/or of this Agreement.

5. The Company ratifies and approves all of the terms of the Subscription Agreement in the form of Exhibit "A" hereto annexed, and agrees to be bound by the terms of all agreements in said form Exhibit "A" executed by Participants.

6. In the event that by reason of death, cancellation of a Subscription Agreement or in any other manner, any shares of stock and/or other securities acquired by the Trustees under the terms hereof, either by purchase from the Company or as a stock dividend or otherwise, shall, under the terms of the Subscription Agreements and/or of this Agreement, not be deliverable to a Participant or his personal representatives, such stock and/or other securities shall be delivered by the Trustees to and accepted by the Company against payment by the Company to the Trustees of the net cost thereof to the Trustees in determining which [fol. 172] net cost there shall (without limiting the generality of such term) be taken into account the original cost thereof and interest paid by the Trustees upon so much of any loan as is attributable to the amount of the cost thereof, and any amounts paid by the Trustees to the Participant by way of interest on out-of-pocket payments of such Participant repaid to him under the terms of the Subscription Agreement relating to such stock and/or other securities.

7. The Company hereby agrees to indemnify the Trustees and hold them harmless against any claim, damage or loss of any kind based on any act done by them or either of them under or in pursuance of this Agreement, or the Subscription Agreements, except in case of gross fraud or wilful misfeasance.

8. The Individual Trustee agrees to serve hereunder without commissions or compensation of any kind, all of which he hereby, on behalf of himself and his personal representatives, waives. The Corporate Trustee shall receive reasonable compensation to be paid by the Company, the amount of which shall be agreed upon between the Company and the Corporate Trustee. The reasonable expenses and disbursements of the Trustees shall be paid by the Company.

9. In the event of the death, resignation or incapacity or inability for any reason of the Individual Trustee or any

successor succeeding him as Trustee under the trust, to continue in such capacity, the Company shall appoint his [fol. 173] successor. In the event of the resignation or inability for any reason to act of the Corporate Trustee or any trustee succeeding it as trustee under the trust, its successor shall be appointed by the Company. The Company may at any time remove either Trustee or any successor trustee, with or without cause, and appoint a successor to the Trustee or Trustees so removed. The removal by the Company of any Trustee or successor trustee and the appointment of a successor trustee either in the event of such a removal or in the event of the death, resignation or incapacity or inability for any reason of a trustee to continue in such capacity, shall be evidenced by resolution of the Board of Directors of the Company exercising such right of removal and/or appointment. Any Trustee or successor trustee upon receiving a certified copy of a resolution of the Board of Directors of the Company exercising such right of removal and/or of appointment of a successor, shall deliver to his or its successor so appointed all certificates of stock, money, books, papers and/or property, documents and records of any kind belonging to or relating to the trust hereby created then in his or its possession or under his or its control. Every such trustee appointed in place of the Individual Trustee or his successor in the trust shall be an individual. Every such trustee appointed in place of the Corporate Trustee or its successor in the trust shall be a properly qualified bank or trust company in good standing having an office in the Borough of Manhattan, if there be such a bank or trust company willing and able to accept the trust upon reasonable and customary terms.

[fol. 174] 10. The word "Trustee" whenever used herein shall be deemed to refer to the Trustees herein named and their respective successor or successors. The term "Individual Trustee" whenever used herein shall be deemed to refer to the individual trustee named herein and any individual succeeding to him as trustee hereunder. The term "Corporate Trustee" whenever used herein shall be deemed to refer to the corporate trustee named herein, and any bank or trust company succeeding to it as corporate trustee hereunder.

11. The Trustees may employ agents and attorneys in and about the performance of any of their duties hereunder or under said Subscription Agreements and shall not be answerable for the default or misconduct of any such agent or attorney apppointed by them in pursuance thereof if such agent or attorney shall have been selected with reasonable care.

The Trustees may construe any of the provisions of this Agreement and of the Subscription Agreements in so far as the same may appear to be ambiguous or inconsistent with any other of the provisions of either of such Agreements, and any construction so placed upon any provision hereof by the Trustees in good faith and in accordance with the advice of counsel shall be binding upon the Company and upon all Particiipants.

The Trustees may at any time and from time to time enter into an agreement or agreements supplemental hereto, with the Company, curing any defect or supplying any omission in or from any of the provisions of this Agreement, and any such supplemental agreement so entered into in good faith and in accordance with the advice of counsel shall be binding upon all Participants.

[fol. 175] The Trustees shall not be liable for any error of judgment or for any act done or steps taken or omitted by them in good faith, or for any mistake of fact or of law, or for anything which they may do or refrain from doing in connection herewith, except only for their own wilful default.

The Trustees may advise with legal counsel and any action under this Agreement taken or suffered in good faith by the Trustees in accordance with the opinion of such counsel shall be conclusive upon the Company and upon Participants, and the Trustees shall be fully protected with respect thereto.

The Trustees shall incur no liability for but shall be protected with respect to any and all acts done or actions taken, suffered or omitted by them in reliance upon any notice, consent, approval, certificate, affidavit, statement or other instrument delivered to them pursuant to any of the provisions of this Agreement, or otherwise, and believed by them to be genuine, and to have been made, signed, executed, verified, certified, issued, given or delivered by the proper person or persons; and the Trustees shall be

under no duty to make any investigation or inquiry as to any statement contained in any such instrument, but may accept the same as conclusive evidence of the truth thereof.

The Trustees shall not be liable for any taxes, assessments or other charges whatsoever.

The Trustees shall not be responsible for the authorizing, validity or sufficiency of the title to any certificates of stock received, held or disposed of by them hereunder.

12. The trust hereby created shall continue for such time as may be necessary to accomplish the purposes for which [fol. 176] it is created and shall in any event terminate when all of the shares of stock are allotted and subscribed for by Participants under Subscription Agreements in the form of Exhibit "A" and any stock dividends thereon and stock and/or other securities purchased under rights in connection therewith shall have been delivered to Participants and/or returned to the Company.

13. Any property, stock, securities or money remaining in the possession or under the control of the Trustees hereunder upon the termination of the trust created hereby shall be delivered and/or paid by the Trustees to the Company.

14. This agreement shall be binding upon and enure to the benefit of the Trustees and their respective successor and successors as such Trustees, and the Company, its successors and assigns.

In witness whereof these presents have been duly executed by the parties hereto the day and year first above written.

The American Tobacco Company, by George W. Hill, President.

Attest: J. Raymond Cummings, Assistant Secretary. (Corporate Seal.) Guaranty Trust Company of New York, by M. P. Callaway, Vice-President. Attest: Leo B. Bieher, Assistant Secretary. (Corporate Seal.) Junius Parker. (L. S.)

Exhibit "A", referred to in the above Trust Agreement Schedule 1, is identical with the Subscription Agreement hereinabove contained.

[fol. 177] IN UNITED STATES DISTRICT COURT

In Equity. 60-94

[Title omitted]

Consolidated Cause

AFFIDAVIT OF J. ARTHUR LEVE

[Referring to Order of Consolidation]

STATE OF NEW YORK,
County of New York, ss:

J. Arthur Leve, being duly sworn, deposes and says:

1. I am a member of the firm of Chadburne, Stanchfield & Levy, attorneys for the defendants George W. Hill, C. F. Neiley and Vincent Riggio.

2. Attached hereto are true copies of stipulations signed by plaintiff, sua persona and the attorneys for the defend-[fol. 178] ants in the above-entitled causes, and the order of the Hon. Alfred C. Coxe signed November 24, 1931, consolidating into one action in this Court, the above-entitled causes and directing that the amended complaint heretofore served in Richard Reid Rogers v. George W. Hill, et al. (Equity 59-115) shall serve as an amended complaint in Richard Reid Rogers v. Thomas R. Taylor, et ano. (Equity 60-94).

3. The original of this order signed by the Hon. Alfred C. Coxe was duly filed with the Clerk of this Court on November 24, 1931, as a perusal of the records of this Court will disclose.

4. An examination of the files in this consolidated cause discloses that the originals of the stipulations and orders have either been lost or mislaid and are not now available on a motion which is to be heard in this Court on January 15, 1932.

J. Arthur Leve.

Sworn to before me this 13th day of January, 1932. W. Caverly, Notary Public, New York County. N. Y. Co. Cl'ks No. 329, Reg. No. 3C383. Commission expires March 30, 1933. (Seal.)

[fol. 179] IN UNITED STATES DISTRICT COURT

E-59-115

RICHARD REID ROGERS, Plaintiff,

against

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. Riggio, and The American Tobacco Company, Defendants

E-60-94

RICHARD REID ROGERS, Plaintiff,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants

ORDER OF CONSOLIDATION—NOV. 24, 1931

Upon the annexed stipulation signed by the plaintiff, sua persona, and the attorneys for the defendants, in the above entitled causes,

It is ordered that

1. The above entitled causes be consolidated into one action in this Court and that the orders and proceedings [fol. 180] heretofore had in said causes are hereby made orders and proceedings in this cause, and that the consolidated cause receive the title of Richard Reid Rogers, Plaintiff, against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, Defendants (In Equity No. 60-94, Consolidated Cause).

2. The amended complaint heretofore served in Richard Reid Rogers v. George W. Hill, et al. (E. 59-115) shall serve as an amended complaint in Richard Reid Rogers v. Thomas R. Taylor, et ano. (E. 60-94), and that any answer or answers filed by the defendants in said Hill case (E. 59-115) shall be deemed for all purposes as an answer to the Taylor case (E. 60-94).

3. The time of the defendants Hill, Neiley, Riggio, Taylor, and The American Tobacco Company, to move, answer, or plead to each of the complaints herein, viz., the amended

complaint — the Hill case (E. 50-115), which shall serve also as the amended complaint in the Taylor case (E. 60-94), shall be extended to and including December 8, 1931.

(Sgd.) Alfred C. Coxe, United States District Judge.

[fol. 181] In United States District Court

E-59-115. E-60-94

[Titles omitted]

Stipulation as to Consolidation

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, as follows, that:

1. The above entitled causes be consolidated into one action in this Court and that the orders and proceedings heretofore had in said causes are hereby made orders and proceedings in this cause, and that the consolidated cause receive the title of Richard Reid Rogers, Plaintiff against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, Defendants (In Equity No. 60-94, Consolidated Cause).

[fol. 182] 2. The amended complaint heretofore served in Richard Reid Rogers v. George W. Hill, et al. (E. 59-115) shall serve as an amended complaint in Richard Reid Rogers v. Thomas R. Taylor, et ano. (E. 60-94), and that any answer or answers filed by the defendant in said Hill case (E. 59-115) shall be deemed for all purposes as an answer to the Taylor case (E. 60-94).

3. The undersigned defendants' time to move, answer, or plead to each of the complaints herein, viz., the amended complaint in the Hill case (E. 59-115), which shall serve also as the amended complaint in the Taylor case (E. 60-94), shall be extended to and including December 8, 1931.

Dated New York, November 23, 1931.

(Sgd.) Richard Reid Rogers, Plaintiff, sua Persona.
(Sgd.) Chadbourne, Stanchfield & Levy, Attorneys for Defendants, Hill, Neiley, Riggio, Taylor, and the American Tobacco Company.

So ordered 11/24/31.

(Sgd.) Alfred C. Coxe, United States District Judge.
(Sgd.) C. W.

[fol. 183] STATE OF NEW YORK,
County of New York, ss:

On this 23rd day of November, 1931, before me personally appeared Richard Reid Rogers, to me known and known to me to be the person who duly executed the foregoing stipulation, and he duly acknowledged to me that he executed the same.

Anderson Woods, Notary Public, Kings Co., No. 335. Cert. filed in N. Y. Co. No. 395. Comm. expires March 30, 1933. (Seal.)

[fol. 184] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity

RICHARD REID ROGERS, Plaintiff,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants

COMPLAINT

[Superseded by Amended Complaint in Rogers v. Hill et al., E 59-115, Pursuant to Order of Consolidation]

The plaintiff, who sues on behalf of himself and all other stockholders of the defendant, The American Tobacco Company, who choose to come in and contribute to the costs and expenses of this action, alleges:

1. He is a citizen of New York and the owner and registered owner of 200 shares of the Common Stock of defendant company acquired in 1916, and 400 shares of the Common Stock B of said company acquired since 1925.

2. The defendant Taylor is a resident and citizen of the State of New Jersey.

3. The American Tobacco Company is a corporation organized under the laws of New Jersey prior to 1905, and is engaged in the manufacture and sale of tobacco products.

[fol. 185] 4. The value of the matter in controversy in this action is in excess of Three thousand Dollars ($3,000) exclusive of interest, costs and disbursements; and there is no collusion between the plaintiff and the defendants to confer jurisdiction on this court.

5. On the first of January, 1931, the capital structure of the defendant, The American Tobacco Company, was as follows: Preferred Stock having a par value of $100 a share, authorized $54,010,600, outstanding $52,699,700; Common Stock having a par value of $25 a share, authorized $50,000,000, outstanding $40,242,400; Common Stock B having a par value of $25 a share, authorized $100,000,000, outstanding $76,933,950. In addition, it had outstanding on that date bonds of the par value of $1,064,350. Its current liabilities were approximately $5,000,000, and its current quick assets were approximately $147,000,000.

6. The Common Stock B was authorized by an amendment of the charter in 1920. It has the same financial status as the Common Stock, but no voting rights on corporate management.

7. The defendant Taylor is and has been since sometime in 1929 a director and vice-president of the defendant, The American Tobacco Company.

8. On information and belief the defendant Taylor received from the defendant The American Tobacco Company from the year 1929 to and including the present time a fixed salary as vice-president of said company of not [fol. 186] less than $25,000 per annum. In addition he received insurance, sick benefits and pension rights at the expense of the company of substantial value, but in amounts at the present time unknown to the plaintiff. The defendant Taylor also claims the right by way of additional compensation to participate in the current year to the extent of approximately 3,000 shares in a distribution of the Common Stock B of the defendant company under a stock subscription plan, the legality of which is not admitted and which is the subject of an independent litigation, whereby said defendant acquires said stock at $25 a share when at the time of acquisition it was selling in the stock market

in substantial amounts in excess of $112 a share, and has since sold at over $130 a share.

9. The plaintiff further avers that in addition to his fixed salary and other benefits hereinbefore referred to, the defendant Taylor on information and belief received by the way of profit sharing for the year 1929, 1½ percentum of all the net profits of said company in excess of $11,369,000 per annum, amounting to approximately $300,000, and 1½ percentum of said profits for the year 1930, amounting to approximately $400,000.

10. Plaintiff alleges said profit distribution was paid to the defendant Taylor pursuant to a by-law claimed to have been adopted by the shareholders at a stockholders' meeting held in Jersey City, N. J., March 13, 1912. A copy of said by-law marked Exhibit A, and of the notice sent out to the stockholders of the meeting at which said by-law was to be acted upon, marked Exhibit B, are annexed hereto and made a part of this complaint.

[fol. 187] 11. The plaintiff alleges that the said profit participation, as well as the by-law under which it was made, was illegal, ultra vires and void for the following reasons: (1) because by the charter of the defendant, The American Tobacco Company, hereto annexed and made a part hereof as Exhibit C, the directors were empowered to apply any surplus or net profits or earnings over and above the capital stock paid in from time to time only to the acquisition of property, or to the payment of dividends, and were not by any of the terms of said charter authorized to divert to any officer of the company any portion of such profits, surplus or earnings by way of profit participation; (2) because under the General Corporation Laws of New Jersey profit participation by officers or employees of any New Jersey corporation was not legal prior to the passage of Chapter 175 of the Public Laws of 1920, which by Subsection b of Section 1 for the first time provided for a participation by all or any of the employees of a New Jersey corporation in the profits of the corporate enterprise; (3) because the charter of the defendant company expressly provided that the power to make and alter by-laws of said company was conferred on the directors thereof, and the stockholders had no power to adopt the said by-law; (4)

because the notice of the meeting at which said by-law is claimed to have been adopted by the shareholders (a) did not specify the officers to whom such profit participation was to be paid; (b) did not specify that the profit participation was to be paid to officers as salary for the year in addition to fixed salaries; and (c) did not state that the profit participation was to be continued beyond the year when adopted.

[fol. 188] 12. The plaintiff further alleges since the said by-law was adopted or attempted to be adopted by the stockholders, the stockholders have added to the capital of the company over $113,000,000, of which approximately $65,000,000 was contributed from surplus earnings of said company between 1912 and 1931, and $48,823,875 from a sale of 390,583 shares of Common Stock B as of October 1, 1929; that even if valid when adopted the measure of compensation fixed by said by-law is not equitable or fair; and if applied would result in a total salary compensation to defendant Taylor, exclusive of insurance and pension benefits, or of profits from the purchase of 3,000 shares of stock at $25 a share heretofore referred to, but including fixed salary, of approximately $325,000 for the year 1929 and $425,000 for the year 1930; and that such compensation is exorbitant, excessive and illegal.

13. In a letter addressed by plaintiff prior to the institution of this suit be made a written demand on the defendant, The American Tobacco Company, to institute action against the defendant Taylor, among other officers of said company, to require him and them to account to the company for any excess of salaries or other profit participation paid him over and beyond such amount as the court might find to be reasonable for the years herein included, a copy of which letter is annexed hereto as Exhibit D; and that thereafter the said company by a letter addressed to plaintiff, a copy of which is annexed hereto as Exhibit E, declined to bring such suit.

[fol. 189] 14. The plaintiff further avers that the various payments made to the individual defendant herein were never disclosed to the stockholders of the said company by any official or other communication prior to February, 1931, when the plaintiff as a stockholder made an application to

the Supreme Court to examine the books of the said company with respect to salaries and other benefits or payments made by said company to its officers, directors and employees, and that prior to said date he had no knowledge thereof. He further says that prior to January 30, 1931, when it was announced in the newspapers that the company had sold to its employees 56,712 shares of Common Stock B at $25 a share, he had no knowledge of that fact; and did not learn until a pamphlet was distributed to stockholders by the President, George W. Hill, on or about March 14, 1931; to what extent the said individual defendant had profited by a sale of the stocks sold at $25 a share on January 30th of this year.

15. Plaintiff avers (1) that the profit participation paid to the defendant Taylor under the aforesaid by-law is illegal and void and a waste of corporate assets; (2) that if not illegal, because of the original invalidity of said by-law, that such profit sharing when added to his fixed salary for the years 1929 and 1930 renders his total compensation exorbitant, excessive, and to the extent which it exceeds a reasonable and fair salary for the services performed by said Taylor, is a waste of corporate assets to the detriment of this plaintiff and all other stockholders of defendant company; that unless enjoined the defendant company for [fol. 190] the current year and all future years will continue to pay to said Taylor compensation based upon a fixed salary and 1½% of all the profits of the company in excess of $12,369,000 per annum as provided by the terms of said by-law, to the irreparable injury of this plaintiff and all other stockholders of defendant company.

The plaintiff therefore prays:

(1) That the defendant Taylor be required to account for all monies paid to him in addition to his fixed salary by way of profit participation under the ultra vires and illegal by-law purported to have been adopted March 13, 1912, and that he be required to refund and repay to the company any and all such payments received by him from the years 1929 to the date of judgment herein, together with interest thereon from the date when accrued until paid;

(2) That if any effect be given to such by-law, then that the Court fix and determine the fair and reasonable com-

pensation of the defendant Taylor for each of the years aforesaid, and that he be compelled to account for and pay over to the said, The American Tobacco Company, the excess of such monies, profits or benefits actually received by him over such sum as the Court may fix as his reasonable compensation as an officer of the said company for each of said years, together with interest thereon;

(3) That the said The American Tobacco Company be enjoined from hereafter paying to the defendant Taylor [fol. 191] any further share of profits as provided for by the terms of the aforesaid illegal by-law; or any sum or consideration whether in the form of cash or stock below its market value, over and beyond the sums that may be fixed by the Court as reasonable compensation with respect to the defendant Taylor;

(5) And that the Court accord this plaintiff such other and further relief as he, and all other stockholders of said company, may be entitled to.

Respectfully submitted.

Richard Reid Rogers, Plaintiff, in sua Persona.

Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.

[fols. 192-194] Exhibit A to complaint in Rogers v. Taylor omitted; printed side page 23 ante.

[fol. 195] Exhibit B to complaint in Rogers v. Taylor omitted; printed side page 26 ante.

Exhibit C to complaint in Rogers v. Taylor same as Exhibit C to amended complaint, E. 59-115, pages 27 to 59, supra.

[fol. 196] Exhibit D omitted; printed side page 60 ante.

[fols. 197-201] Exhibit E to complaint in Rogers v. Taylor omitted; printed side page 61 ante.

[fol. 202] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR FURTHER PARTICULARS—NOV. 6, 1931

A motion having been made by defendants by an order to show cause dated June 2, 1931, and signed by Hon. William Bondy, United States District Judge, for an order requiring plaintiff to amend his bill of complaint by

(1) setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's complaint, or

(2) striking out certain allegations of the complaint;

And after hearing William M. Parke, Esq., of counsel for defendants, in support of the motion, and Richard Reid [fol. 203] Rogers, sua persona, for plaintiff, in opposition thereto;

Now, on motion of Chadbourne, Stanchfield & Levy, attorneys for defendants,

It is ordered that defendants' motion to compel plaintiff to amend his bill of complaint by setting out a further and better statement of the nature of plaintiff's claim be and the same hereby is granted as follows:

(1) that the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 8 of the bill of complaint, by setting forth the stock subscription plan;

(2) that the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 14 of the bill of complaint, by setting out a copy of the pamphlet distributed to the stockholders by the President, George W. Hill, on or about March 14, 1931.

It is further ordered that the alternative motion to strike out certain paragraphs of the complaint be and the same hereby is denied.

Woolsey, United States District Judge.

Plaintiff consents to the form of the order; but excepts to the order itself in so far as it grants further and better particulars.

Rich'd Reid Rogers.

[fol. 204] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FURTHER PARTICULARS

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, as follows:

1. The further particulars directed to be furnished in this action by the service of an amended complaint shall be furnished, in lieu of the service of an amended complaint, in the form of a verified bill of particulars, but such bill of particulars shall be deemed for the purposes of any motion that may be made by any party to this action as if incorporated and set forth at length in the complaint.

2. Such information shall be furnished in the form of a verified bill of particulars within ten (10) days after service of a copy of an order granting the undersigned defendants' motion for further particulars.

3. The undersigned defendants' time to answer, move, or otherwise plead with reference to the amended complaint [fol. 205] shall be extended to and including twenty (20) days after service of the verified bill of particulars.

Dated New York, November 6, 1931.

Rich'd Reid Rogers, Plaintiff, sua Persona. Chadbourne, Stanchfield & Levy, Attorneys for Defendants Thomas R. Taylor and The American Tobacco Company.

So ordered.

Woolsey, United States District Judge.

November 6, 1931.

[fol. 206] IN UNITED STATES DISTRICT COURT

E-60-94

[Title omitted]

BILL OF PARTICULARS

Pursuant to order of Court entered herein November 7, 1931, plaintiff herewith furnishes further and better particulars of all matters covered by said order.

1. With reference to the employees' stock subscription plan referred to in paragraph 8 of the complaint and covered by paragraph (1) of the order, plaintiff refers to the plan adopted by resolution of the stockholders July 28, 1930, a copy of which is annexed hereto and marked "Exhibit A"; to the agreement between the defendant The American Tobacco Company and Guaranty Trust Company of New York and Junius Parker dated January 30, 1931, together with the subscription agreement therein referred to, which was signed by various officers and employees among whom was the defendant, Thomas R. Taylor, who signed in the amount of 660 shares of common stock B, a copy of which agreement, with the subscription agreement therein referred to, appears on pages 16 to 28, inclusive, of the pamphlet issued by George W. Hill annexed hereto and hereinafter referred to as "Exhibit B"; and to the further fact that in carrying out said plan the Guaranty Trust Company of New York on February 10, 1931, paid the de-[fol. 207] fendant The American Tobacco Company $1,417,-800 for 56,712 shares of said common stock B out of which the allotment to defendant Taylor and others referred to above was made.

2. With reference to the pamphlet distributed to stockholders by George W. Hill on or about March 14, 1931, referred to in paragraph 14 of the complaint and covered by paragraph (2) of the order, plaintiff annexes hereto a copy of said pamphlet and makes the same a part hereof, marked "Exhibit B."

Dated New York, N. Y., November 10, 1931.

Richard Reid Rogers, Plaintiff in sua Persona. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

Duly sworn to by Richard Reid Rogers. Jurat omitted in printing.

[fol. 208] EXHIBIT A

Same as Exhibit A to Bill of Particulars in Rogers v. Hill, E. 59-115, pages 121-123, supra.

Exhibit B

Same as Exhibit B attached to Bill of Particulars in Rogers v. Hill action, E. 59-115, page 124, supra.

[fol. 209] In United States District Court

E-60-94

[Titles omitted]

Consolidated Cause

Affidavit of James B. Harvie

State of New York,
County of New York,
Southern District of New York, ss:

James B. Harvie, being duly sworn, deposes and says:

Under Article XII o the By-laws of The American Tobacco Company, the Treasurer is called upon to ascertain, as soon as practicable after the end of each year, the net profits of the Company as defined in said Article, and to pay to the persons entitled thereto under said Article, the amounts of additional compensation due to said persons under the terms thereof.

[fol. 210] As Treasurer, it has been my practice for many years, as it has also been that of my predecessors in such office, to make a conservative calculation immediately at the conclusion of the year, and thereupon, based on such calculation, to pay to each person entitled to additional compensation under Article XII, in partial payment and on account of such additional compensation, an amount calculated by me to be a conservative payment; thereafter paying to such persons the balance found due them after our books have been finally closed.

Accordingly, after the end of the calendar year 1931, to wit, on January 2, 1932, there were paid by me the following amounts to the following persons, as partial payments of the amounts that I estimated were due them for the year 1931 under Article XII of our By-laws:

George W. Hill	$850,000
Charles F. Neiley	418,250
Vincent Riggio	418,250
Executors of the Estate of Charles A. Penn, deceased	350,000
Arthur C. Mower	250,000

James B. Harvie.

Sworn to before me this 13th day of January, 1932. W. O. Taylor, Notary Public, Nassau Co. Certificate filed New York Co. No. 305. N. Y. Register Certificate No. 3T217. My commission expires March 30, 1933. (Seal.)

[fol. 211] In United States District Court, Southern District of New York

In Equity. No. 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, Defendants

Consolidated Cause

Opinion

Plaintiff moves for an order striking out the 1st, 2nd, 3rd, 4th and 5th separate defenses; for a decree adjudging By-Law XII invalid, requiring three of the company's officers to account for payments and enjoining the company from making further payments thereunder; or, in the alternative, for an injunction pendente lite against further payments to any president or vice-president of the company under the by-law.

Upon my consideration of the case to date, I am persuaded that a cause of action is stated in the bill, that this

court is bound to exercise jurisdiction and that in Rogers v. Guaranty Trust Co., et al., E 59/307, Judge Patterson has not held to the contrary. I am persuaded also that, whatever the outcome of more mature consideration may be, the contentions of the plaintiff on the first and second branches of his motion have enough merit to require that the status quo be maintained until they are deliberately passed on.

[fol. 212] My present impressions are that, in so far as pertinent to the determination of this suit, the by-law is invalid and the defenses are insufficient. These impressions, however, are tentative. Because of inadequate opportunity up to this time for investigation and reflection, I am not yet prepared to announce them as final views. The briefs are elaborate and numerous authorities are cited. The exigencies of performing other court duties would unavoidably result in much additional delay before it would be possible for me to complete the study which would be essential for the formulation of a reasoned statement upon all the interesting and important—as well as in some aspects novel—issues raised.

It seems to me that, as matter of good administration, it is desirable, if it be practicable, to procure an early authoritative ruling on the by-law and on the defenses. I have concluded, therefore, presently to pass on a single matter; also to do this in a form which I think will put the case in shape for immediate review by the Circuit Court of Appeals and, if that court should deem wise, for review on a question or on questions of crucial consequence, the inquiry as to the by-law being of such nature that obviously, as I conceive, the controversy over it should be settled as speedily as orderly procedure permits.

I am now ready to award the plaintiff, and I feel that he is entitled to, an injunction pendente lite against future payments to the individual defendants (served or appearing and claiming them) under the by-law either for 1931 or for any subsequent year. If an appeal from an order to that effect were taken promptly and prosecuted expedi-

[fol. 213] tiously, pursuant to Section 129 of the Judicial Code (28 U. S. C. A., sec. 227), my disposition would be to postpone the balance of the motion until after a decision by the appellate court. On the other hand, I reserve the right, in the light of developments hereafter, to proceed

with the other phases of the motion. Moreover, I shall proceed with them if all parties desire me to do so or if the defendants elect not to appeal.

In the event of an appeal and its being heard prior to the Court of Appeals adjourning for the summer, it seems likely that a ruling which would guide this court could be obtained previous to any question arising with respect to a distribution under the by-law out of the company's 1932 profits; and the proof shows that for 1931 the major part of a distribution, in compliance with the terms of the by-law, has already been made.

I regard the course I am adopting as in the interest of both sides and not unfair to either side. There is no suggestion here of insolvency. In the absence of some other ground against suspension, on the terms stated, of action by this court on his motion, I see no reason for complaint by the plaintiff. If, in its discretion, the Court of Appeals should by autumn rule on some controlling question (which I assume necessarily would eventually have to be ruled on by that court any way), then this court could much better proceed, in conformity with that decision, to a final disposition.

Settle order for temporary injunction, in accord with the foregoing, on two days' notice; amount of bond to be fixed, unless agreed on.

Dated March 17, 1932.

Francis G. Caffey, United States District Judge.

[fol. 214] In United States District Court

In Equity. No. 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company, Defendants

Consolidated Cause

Order Appealed From—March 23, 1932

This cause having come on to be heard on a motion by the plaintiff (1) to strike out the First, Second, Third,

Fourth and Fifth Separate Defenses of the answer of defendants The American Tobacco Company, George W. Hill, C. F. Neiley, V. Riggio and T. R. Taylor; (2) for a decree upon the pleadings and bill of particulars declaring by-law XII of 1912 invalid, and requiring the defendants Hill, Neiley and Riggio to account for all payments severally received by each of them thereunder, and enjoining the defendant The American Tobacco Company from making any [fol. 215] further payments thereunder; and (3) in the alternative to the relief mentioned in clause (2) for an injunction pendente lite, enjoining the defendant The American Tobacco Company from making any further payments to any president or vice-president under said by-law;

Now, upon the notice of motion, the verified amended complaint of the plaintiff, the verified bill of particulars furnished by plaintiff, the plaintiff's affidavit sworn to on the 7th day of January, 1932, the verified answer of the defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, and the affidavit of J. B. Harvie sworn to on January 13, 1932, with proof of service of all said papers; and the plaintiff having been heard pro se in behalf of said motion; and the aforesaid defendants by Messrs. Chadbourne, Stanchfield & Levy (Victor J. Dowling, Louis S. Levy, William M. Parke, George W. Whiteside, J. Arthur Leve, J. Edward Ashmead and Merritt Lane, of Counsel) having been heard in opposition thereto;

And it appearing to the Court that the complaint states a cause of action, and that it is bound to exercise jurisdiction of said cause; and the present impression of the Court being that the said by-law XII of 1912 is invalid and that the First, Second, Third, Fourth and Fifth Separate Defenses of the answer of defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company are insufficient; and it further appearing that the plaintiff is entitled to have the status quo maintained until the issues raised by the pleadings are decided; it is

[fol. 216] Ordered that, upon the giving or waiver of bond as hereinafter provided, an injunction pendente lite be and it is granted to the plaintiff enjoining The American Tobacco Company from making any further payments under

said by-law to any president or vice-president; and it is further

Ordered that the bond of the plaintiff, until otherwise ordered by this Court, be and the same hereby is fixed at $1,000.00; that the condition thereof be as prescribed by section 382 of title 28 of the United States Code; that unless the solicitors of the defendants by stipulation filed in this case waive the giving of a bond or consent to reduction of the amount thereof, the injunction hereby granted shall become effective only upon a bond in conformity with this order being filed in this cause within ten days from the date hereof and being approved by the Court.

Francis G. Caffey.

[fol. 217] IN UNITED STATES DISTRICT COURT

E-60-94

[Title omitted]

Consolidated Cause

PETITION FOR APPEAL

The above named defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company, conceiving themselves aggrieved by the order and decree made on the 23rd day of March, 1932, and entered on the 24th day of March, 1932, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said order and decree [fol. 218] were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., March 31, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and the American Tobacco Company. Office & Post Office address: No. 25 Broadway, Borough of Manhattan, New York, N. Y.

Ordered that the appeal be and it is hereby allowed upon appellants filing a bond as required by law for the sum of Two hundred and fifty Dollars ($250).

Wm. Bondy, U. S. D. J.

[fol. 219] IN UNITED STATES DISTRICT COURT

In Equity. No. 60-94

[Title omitted]

Consolidated Cause

ASSIGNMENT OF ERRORS

The defendants, Hill, Neiley, Riggio, Taylor, and The American Tobacco Company, in the above entitled cause, in connection with their petition for the allowance of an appeal herein, respectfully make the following assignment of errors, which occurred in the order and decree from which said appeal is taken and in the opinion of the District Court rendered prior to the entry of said order and decree, to wit:

(1) The Court erred in granting plaintiff's motion for an injunction pendente lite.

(2) The Court erred in holding that the complainant states a cause of action.

[fol. 220] (3) The Court erred in holding that it is bound to exercise jurisdiction of said cause.

(4) The Court erred in holding the By-Law invalid.

(5) The Court erred in not dismissing the complaint under the First and Third Separate Defenses.

(6) The Court erred in holding that the First, Second, Third, Fourth, and Fifth Separate Defenses of defendants Hill, Neiley, Riggio, Taylor, and The American Tobacco Company were insufficient.

(7) The Court erred in holding that the plaintiff is entitled to have the status quo maintained until the issues raised by the pleadings are decided.

Wherefore appellants pray that the order and decree of the District Court may be reversed, and for such other and further relief as justice may require.

Dated New York, N. Y., March 31, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and the American Tobacco Company. Office & Post Office address: 25 Broadway, Borough of Manhattan, New York City.

[fol. 221] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the United States District Court for the Southern District of New York in the above entitled action, and that the same may be settled and ordered on file herein.

Dated New York, N. Y., April 7th, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and the American Tobacco Company. Richard Reid Rogers, Plaintiff, pro se.

In United States District Court

Order Settling Case

Pursuant to the foregoing stipulation, the foregoing transcript is hereby settled as a true and correct transcript of the record of said action in this Court, and as such it is ordered on file herein.

Dated New York, N. Y., April 7th, 1932.

Francis G. Caffey, United States District Judge.

[fol. 222] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 223] In United States District Court, Southern District of New York

E 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants

Richard Reid Rogers, Plaintiff,

against

Thomas R. Taylor and The American Tobacco Company, Defendants

Consolidated Cause

Statement

This is the second appeal to the Circuit Court of Appeals for the Second Circuit in the above-entitled consolidated cause. The former appeal was taken from an order of the District Court for the Southern District of New York entered March 24, 1932, upon a motion made by plaintiff-appellant: (1) for an order striking out the separate defenses in the answer; (2) for judgment upon the pleadings for certain specified relief; and (3) in the alternative for an injunction pendente lite. The District Court, not deciding the other branches of the motion, made an order granting an injunction pendente lite on condition of the filing of a bond in the sum of $1,000 by the plaintiff, which bond was filed and approved, and the injunction was issued and served.

[fol. 224] Upon appeal by the defendants from said order, the Circuit Court of Appeals, after rendition of a majority opinion and a dissenting opinion in which the merits of the cause were discussed, directed a reversal of the order granting the injunction pendente lite, and sent its mandate to the District Court to that effect.

The District Court thereupon, upon the coming down of the mandate and after reading the majority opinion of the

Circuit Court of Appeals, and concluding therefrom that the latter Court had decided the merits of the cause unfavorably to the plaintiff, made its decree, which was entered July 8, 1932, dismissing the complaints upon the merits; from which decree this appeal was taken on October 5, 1932.

For an account of the proceedings prior to the former appeal, reference is made to the statement at the beginning of the record on that appeal, incorporated in the record on the present appeal, since the filing of which there has been no change in the parties hereto or their attorneys.

The papers contained in the record on the former appeal having already been printed and being already on file with the Clerk of the Circuit Court of Appeals, the reprinting thereof has been dispensed with by order of that court entered November 2, 1932, which order provides that said copies already on file may be used by that court as a part of the record on the present appeal.

[fol. 225] In United States Circuit Court of Appeals for the Second Circuit

Before Manton, Swan, and Chase, Circuit Judges

Richard Reid Rogers, Plaintiff-Appellee,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants-Appellants

Richard Reid Rogers, Plaintiff-Appellee,

against

Thomas R. Taylor and The American Tobacco Company, Defendants-Appellants

Appeal from the District Court for the Southern District of New York. Suits by plaintiff against the defendants to have declared invalid a by-law of the American Tobacco Company, a defendant, and for a decree directing that all compensation paid under the provisions of the by-law be

repaid to the corporation and that future distribution thereunder be enjoined. The suits have been consolidated. An order was entered granting an injunction pendente lite, enjoining the company from making any further payments pursuant to the by-law. Defendants appeal. Order reversed.

[fol. 226] Chadbourne, Stanchfield & Levy, Esqs., Attorneys for Appellants, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company (Nathan L. Miller, Esq., Victor J. Dowling, Esq., George W. Whiteside, Esq., J. Arthur Leve, Esq., of Counsel).

Richard Reid Rogers, Esq., Plaintiff-Appellee, pro se.

OPINION

MANTON, Circuit Judge:

The appellee is the owner of 200 shares of common and 400 shares of Common B stock, and seeks a decree declaring Art. XII of the By-Laws of The American Tobacco Company invalid and ordering that all compensation paid thereunder to appellants be repaid to the corporation and future payments be perpetually enjoined. It is sought to have the court fix the amount of compensation to which the appellants, officers of the corporation, are justly entitled during their respective periods of service and that in the future the officers receive no additional contingent compensation. On motion by the appellee to strike out each of the five separate defenses interposed by the appellants, the court held that they were insufficient.

On March 13, 1912, the stockholders of The American Tobacco Company, appellant, adopted as a By-Law, Art. XII, which provided:

"As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an

[fol. 227] amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent of such amount, to the President; one-fifth of the remainder thereof, or 1½ per cent of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers."

By Sec. 5 of this By-Law, it was provided that the By-Law may be modified or repealed only by action of the stockholders of the Company and not by the directors. The By-Law was adopted by a large majority in interest of the Company's shares, 35 preferred shares voting against its adoption. Appellee became a stockholder in 1916. Appellant Hill became a director in 1921 and President on April 7, 1926; Mower, a director on April 6, 1921, and has since become a vice-president; Penn, a director on April 6, 1921, and since a vice-president; appellant Neiley, a director on April 6, 1921, and a vice-president May 1, 1929; appellant Riggio, a director on April 4, 1928, and a vice-president May 1, 1929.

Until the present suit was instituted, the legality of this By-Law was never questioned. The charges of illegality are: (a) that by the charter of the Company, the directors are empowered to apply surplus or net profits only to the acquisition of property or the payment of dividends, and they are not authorized to divert any portion of the profits to officers of the corporation by way of additional compensation; (b) that profit participation by the officers and employees of a New Jersey corporation was not legal prior to the passage of Chapter 175 of the Laws of 1920 (subsection B, Sec. 1); (c) that the power to make and alter by-laws was conferred upon the directors, and the stockholders had no power to adopt the by-law; (d) that the notice of the meeting at which the by-law was adopted did not specify the officers to whom the profit participation [fol. 228] was to be paid; that it did not specify that the profit participation was to be paid to the officers as salaries in addition to their fixed salaries, and did not state that the participation was to be continued beyond the year when adopted.

Among the defenses which were held below to be insufficient were:

(1) that the stockholders of the Company, including the appellee, ratified the payments made to the appellants in accordance with and under the authority of Art. XII;

(2) that the present suit is an attempt to interfere with the internal management of a corporation doing a nation-wide business, the affairs of which are dependent upon the statutes of New Jersey, and that By-Law XII was legally adopted and is valid;

(3) that the amount of compensation paid to the individual appellants was and is fair and reasonable for their services, that the Board of Directors had the right to fix the compensation of its agents and that the payments were made in accordance therewith, as well as under the authority of By-Law XII.

When the appellee purchased his stock he was presumed to know the provisions of the corporation's by-laws and he made his investment with that knowledge. Giesen v. London & Northwest American Mortgage Co., 102 Fed. 584 (C. C. A. 8); Kavanaugh v. Commonwealth Trust Co., 223 N. Y. 103; State v. Shaw, 103 Ohio State 660; Chicago, Springfield & St. L. Ry. Co. v. Martin, 249 Ill. App. 109. The charter of the corporation (Art. II) provides, among other things, that the directors shall have the power "to direct and determine the use and disposition of any surplus or net profits or earnings over and above the capital stock paid in." Directors have power to hire employees. Nothing in the by-laws of this corporation forbade employing [fol. 229] them upon a contingent basis. There is no rule of law of which we are aware that forbids directors from providing contingent or fixed compensation for the employees of a corporation, providing the agreements are fair and free from fraud. But the claim is advanced by the appellee that the directors were empowered to employ surplus, net profits or earnings only in the acquisition of property or in payment of dividends, and that the additional salary allotments here are in direct conflict with the charter provisions. Compensation to officers of a corporation is an operating expense of the company, whether at a fixed salary or based upon a percentage of the profits, and until such expenditures are met there are no net profits of the corporation. It is the sum beyond this which constitutes

the surplus, net profits or earnings referred to in this corporation's charter. Profit participation creates an item of expense in the operation of the business and this has been recognized by judicial decisions in New Jersey, the state of the corporation's creation. Bennett v. Millville Improvement Co., 67 N. J. L. 320; Booth v. Beattie, 95 N. J. Eq. 776; Berendt v. Bethlehem Steel Co., 108 N. J. Eq. 148.

Under the General Corporation Act of New Jersey (Chap. 175, L. 1920), stockholders have adequate power to pay officers an additional and contingent salary out of net profits. Sec. 1, paragraph V, provides that every corporation shall have power to appoint such officers and agents as the business of the corporation shall require and to allow them suitable compensation. By-Law XII is in strict conformity with the express powers delegated to the corporation by the General Corporation Act of New Jersey. Bennett v. Millville Improvement Co., supra. The right to pay compensation by way of a percentage of the net profits is recognized in New Jersey. Smith v. Bedell, 84 N. J. Eq. 268, affirmed 84 N. J. Eq. 509; Booth v. Beattie, supra. Corporate management may pay a participation [fol. 230] of the net profits to officers as additional salary either as a bonus or in the form of shares of stock. Harker v. Ralston, 45 Fed. (2) 929 (C. C. A. 7); Church v. Harnit, 35 Fed. (2) 499 (C. C. A. 6); Ransome v. Moody, 282 Fed. 29 (C. C. A. 2); Greene v. Wilbrahan, 190 Fed. 274; Young v. U. S. Mortg. & Trust Co., 214 N. Y. 279.

It is argued that the phrase "profit participation" was first mentioned in a New Jersey statute in Chap. 175 of the Laws of 1920, and this was the first permission for payment of contingent salaries. It is argued that prior thereto the payment of moneys out of alleged profits was illegal. Section 4 of the act provides:

"The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this State."

Profit participation by employees is not only within the express power of the corporation prior to the enactment of the 1920 statute, but was recognized by the courts of

New Jersey as an implied power of the corporation. Chapter 175 of the Laws of 1920 provided for the particular manner in which such plans therein specified could be adopted. That act authorized the adoption of profit participation; it permitted New Jersey corporations to adopt a plan for the purpose of "furnishing to its employes wholly or in part at the expense of such corporation of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing, social services, recreation or other similar aids for their general welfare." The New Jersey courts, as early as 1899, held the adoption of such plans to be within the implied or express powers of a foreign corporation. Beck v. Pennsylvania R. R. Co., 63 N. J. L. 232.

[fol. 231] Section II of the General Corporation Law of New Jersey (Revision of 1896, Chap. 185) provides that the power to make and alter by-laws shall be in the stockholders, but that any corporation may, in its certificate of incorporation, confer that power upon the directors, and the by-laws made by the directors under such power may be altered or repealed by the stockholders. The charter of this corporation provided that the power to make and alter the by-laws of the corporation shall be conferred upon the directors. This delegation of authority to directors, within the by-laws, is legal. To make or amend by-laws is legal. In re Griffing Iron Co., 63 N. J. L. 168, affirmed 63 N. J. L. 357. The regulation of official duties and salaries is a proper subject for by-laws as within the power of the stockholders or the power of the directors where they are authorized to act. Lilliard v. Oil, Paint & Drug Co., 7 N. J. Eq. 197.

But it is contended that the notice of the meeting at which Art. XII was adopted by the corporation's shareholders was insufficient. The meeting was held March 13, 1912, and it was pursuant to Sec. 17 of the General Corporation Act of New Jersey (Laws of 1896, Chap. 185, as amended by Laws of 1901, Chap. 119, Sec. 1), which permits every corporation to determine by its certificate of incorporation or by-laws the manner of calling and conducting all meetings. Special meetings to make fundamental changes in the corporation require notice of meet-

ings pursuant to the by-laws (Sec. 27, Laws of 1896, Chap. 185, as amended by Laws of 1908, Chap. 84, Sec. 1).

Art. II, Sec. 3 of the By-Laws, provides that due notice of each annual meeting of the stockholders be given by a written or printed notice, mailed at least 20 days prior to the meeting, to each stockholder entitled to vote appearing upon the books of the corporation. It is provided that a public notice of the time and place of holding such meeting be published not less than once a week for two consecutive weeks in a daily newspaper published in the City [fol. 232] of New York. Special meetings are called in like manner, and for these "the notice shall state the object of the special meeting, and no other business shall be transacted at such meeting." From this it is apparent that neither the by-laws of the corporation nor the statutes of New Jersey require a notice of any meeting to include a specification of the details of the business to be conducted. Under the by-laws the object must be stated only for a special meeting. The by-law here (Art. XII) was adopted at a regular annual meeting and the by-laws of the corporation provide that at such meeting "any business may be transacted without notice of the object of such meeting." There was ample notice given to the stockholders on the occasion of the adoption of this by-law. All shareholders were given a written notice stating the date, hour and place of the meeting. It was further said in the notice: "At this meeting there will be presented for consideration, and action upon, a proposed by-law providing for participation by certain officers of the Company in profits, if any, earned by the Company in excess of profits earned during the year 1910 on the brands of businesses now owned by the Company, not exceeding in the aggregate 10% of such excess." The appellee maintains that the by-law could not be passed upon at this meeting because the object set out in the notice was participation by certain officers of the corporation in its profits and therefore no object which dealt merely with salary increases could be passed. This complaint against the notice is frivolous. It sufficiently informed shareholders that a subject-matter to be considered was the payment to certain officers of a contingent salary. By any reasonable inquiry at the meeting, or prior thereto, one to whom this notice was insufficient might have gained further knowledge or surely would have been in a

position to vote his shares of stock intelligently. U. S. Steel Corp. v. Hodge, 64 N. J. Eq. 807.

Moreover, as we have pointed out, the present officers, who are enjoined by the order below, became such years [fol. 233] after the adoption of By-Law XII, providing additional salaries. When they accepted their offices and employment in the corporation, one of the promises of the corporation was their right to compensation for services, measured by additional profits above the sum specified in the by-law. It became part of the contract of employment. It was a promise which the corporation must keep until the by-law is repealed or changed. Metropolitan Rubber Co. v. Place, 147 Fed. 90 (C. C. A. 2); Zwolanek v. Baker Mfg. Co., 150 Wisc. 517.

There is no claim in the bill, nor can the argument be maintained, that there was any fraud or collusion in the passage of this by-law between appellants who have enjoyed the fruits of its enactment and the corporation. The by-law is neither ultra vires, fraudulent nor illegal, and since it is not, courts must refuse intervention because they are powerless to grant it. Here the matter of salaries, like that of other corporation affairs, must be disposed of by the majority of stockholders and in the manner that their interests may dictate, and the action of the majority is binding upon all, whether approved or disapproved by the minority. Individual minority shareholders are not permitted to question the acts of directors, if they are within the powers of the corporation and in furtherance of its purposes, and if they are not unlawful or against good morals and are done in good faith and in the exercise of honest judgment. U. S. Steel Corp. v. Hodge, supra. By-Law XII was properly passed and became a valid governing act of the corporation.

This grew to be a very large corporation. On the 1st of January, 1931, its corporate structure was as follows: preferred stock, par value $100 per share, outstanding $52,699,700; common stock, par value $25, authorized fifty million dollars, outstanding $40,242,400, common stock B, par value $25, authorized One hundred million dollars, outstanding $76,933,950. Its current liabilities were approxi- [fol. 234] mately Five million dollars; current quick assets were approximately One hundred and forty-seven million dollars. It was world-wide in its operations. In 1930, its

net earnings, after deducting all charges and expenses for management and taxes amounted to $43,345,370; it paid dividends on common stock in 1930 of $29,294,000; an extra dividend of $1 was declared in the first quarter of 1931; total dividends paid on its common stock for that year exceeded $28,300,000 and it paid $3,161,982 dividends on its preferred stock. In 1930 it paid to the government $150,000,000 in taxes. During the corporate management of the individual appellants, profits increased some $20,000,000 a year up to 1930. There was divided in 1931 approximately $2,500,000 pursuant to the terms of By-law XII amongst the president and five vice-presidents. The corporation has had a very unusual success due to the skillful management of these able men. With this knowledge at hand, the majority of the stockholders might well have approved the policy year after year of a contingent compensation to the active managers of the corporation's business affairs. They were justified in the retention of by-law XII during this period of years because of the great success attained. That the president and five vice-presidents each received unusually large salaries as a result does not justify a court of equity in attempting to substitute its judgment for the judgment of the stockholders whose affair it is in the absence of any claim of fraud. In any case, we think that the by-law was lawfully passed and that it was valid, effective and controlling in the allotment of additional compensation to officers of the corporation.

Judgment reversed.

Swan, J., dissenting.

[fol. 235] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Before Manton, Swan, and Chase, Circuit Judges

Dissenting Opinion

Swan, Cir. J., dissenting:

In 1912 the stockholders of the appellant adopted a by-law which provided that 10 per cent of the annual "net profits" be distributed, 2½ per cent to the president and

1½ per cent to each of the five vice-presidents "in addition to the fixed salary of each of said officers." The by-law does not expressly say that the payments provided for are [fol. 236] by way of additional compensation to the officers, and the notice of the meeting at which the by-law was adopted referred to the proposed resolution as one for the distribution of profits. If it was really a distribution of profits rather than a method of compensation, the majority stockholders had no power to vote it. I shall assume, however, that the by-law was valid when passed. But it does not follow that it will remain valid for all time regardless of the amount payable under it. If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part, and the majority stockholders have no power to give away corporate property against the protest of the minority. See Endicott v. Marvel, 81 N. J. Eq. 378, 384; Collins v. Hite, 153 S. E. 240 (W. Va.).

The present suits attack payments made under the by-law since 1921, totalling more than $10,000,000, and seek an injunction against further payments. The bonuses paid to the president increased from $90,000 in 1921 to $840,000 in 1930. In the latter year his additional emoluments included a fixed salary of $168,000 and "special cash credits" of $270,000. Bonuses paid four of the vice-presidents for that year totalled $1,830,000, in addition to which they received fixed salaries and special credits totalling $700,000. Apparently these sums were thought insufficient, for in that same year the board of directors initiated a plan which resulted in the distribution to these five officers and directors of almost 30,000 shares of stock at $87 per share less than its then market value. The court below thought that a sufficient showing of invalidity had been made to justify a temporary injunction against future payments under the by-law. In my opinion a bonus of $840,000 to an officer receiving a fixed salary of $168,000, is presumptively so much beyond fair compensation for services as to make a prima facie showing that the corporation is giving away money, and a by-law which sanctions this is prima facie unreasonable, and hence unlawful. This is all we need to hold to support the injunction pendente lite.

[fol. 237] The determination of fair compensation for services is primarily for the directors. Courts hesitate to

overrule the discretion of directors fairly exercised. Here the directors have exercised no discretion; they rely upon a by-law to relieve them of that duty, and the by-law, as it now operates, results in so large a payment that the trial court thought it probably invalid as applied to future earnings. Under such circumstances the courts do not and should not refuse to consider whether a bonus plan is fair or oppressive. See Sotter v. Coatesville Boiler Works, 101 Atl. 744 (Pa.); Collins v. Hite, 153 S. E. 240 (W. Va.); Wight v. Heublein, 238 F. 321 (C. C. A. 4); Nichols v. Olympia Veneer Co., 246 Pac. 941 (Wash.); McKey v. Swenson, 205 N. W. 583, 586 (Mich.); Lowman v. Harvey R. Pierce Co., 120 Atl. 404 (Pa.); Scott v. P. Lorillard Co., 154 Atl. 515 (N. J.), affirmed 157 Atl. 388; Berendt v. Bethlehem Steel Corp., 154 Atl. 321 (N. J. Ch.); Stratis v. Andreson, 150 N. E. 832 (Mass.); Ransome Concrete Machinery Co. v. Moody, 282 F. 29, 32 (C. C. A. 2); Church v. Harnit, 35 F. (2nd) 499, 502 (C. C. A. 6); Booth v. Beattie, 118 Atl. 257 (N. J.), affirmed 123 Atl. 925; Putnam v. Juvenile Shoe Corp., 269 S. W. 593 (Mo.). I think the injunction pendente lite should be affirmed.

[fol. 238] In United States Circuit Court of Appeals for the Second Circuit

Richard Reid Rogers, Plaintiff-Appellee,

against

George W. Hill et al., Defendants-Appellants,

(and another case)

Order for Mandate—June 20, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby

Ordered, adjudged, and decreed that the order of the said District Court be, and it hereby is, reversed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

William Parkin, Clerk.

[fol. 239] MANDATE

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Whereas lately in the District Court of the United States for the Southern District of New York, before you or some of you, in a cause between Richard Reid Rogers and George W. Hill, et al., an order was entered in the office of the Clerk of said Court in the words and figures following, to wit:

This cause having come on to be heard on a motion by the plaintiff (1) to strike out the First, Second, Third, Fourth and Fifth Separate Defenses of the answer of defendants The American Tobacco Company, George W. Hill, C. F. Neiley, V. Riggio and T. R. Taylor; (2) for a decree upon the pleadings and bill of particulars declaring by-law XII of 1912 invalid, and requiring the defendants Hill, Neiley and Riggio to account for all payments severally received by each of them thereunder, and enjoining the defendant The American Tobacco Company from making any further payments thereunder; and (3) in the alternative to the relief mentioned in clause (2) for an injunction pendente lite, enjoining the defendant The American Tobacco Company from making any further payments to any president or vice-president under said by-law;

Now, upon the notice of motion, the verified amended complaint of the plaintiff, the verified bill of particulars furnished by plaintiff, the plaintiff's affidavit sworn to on the 7th day of January, 1932, the verified answer of the defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, and the affidavit of J. B. Harvie, sworn to on January 13, 1932, with proof of service of all said

papers; and the plaintiff having been heard pro se in behalf [fol. 240] of said motion; and the aforesaid defendants by Messrs. Chadbourne, Stanchfield & Levy (Victor J. Dowling, Louis S. Levy, William M. Parke, George W. Whiteside, J. Arthur Leve, J. Edward Ashmead and Merritt Lane, of Counsel) having been heard in opposition thereto;

And it appearing to the Court that the complaint states a cause of action, and that it is bound to exercise jurisdiction of said cause; and the present impression of the Court being that the said by-law XII of 1912 is invalid and that the First, Second, Third, Fourth and Fifth Separate Defenses of the answer of defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor and The American Tobacco Company are insufficient; and it further appearing that the plaintiff is entitled to have the status quo maintained until the issues raised by the pleadings are decided; it is

Ordered that, upon the giving or waiver of bond as hereinafter provided, an injunction pendente lite be and it is granted to the plaintiff enjoining The American Tobacco Company from making any further payments under said by-law to any president or vice-president; and it is further

Ordered that the bond of the plaintiff, until otherwise ordered by this Court, be and the same hereby is fixed at $1,000.00; that the condition thereof be as prescribed by section 382 of title 28 of the United States Code; that unless the solicitors of the defendants by stipulation filed in this case waive the giving of a bond or consent to reduction of the amount thereof, the injunction hereby granted shall become effective only upon a bond in conformity with this order being filed in this cause within ten days from the date hereof and being approved by the Court.

Francis G. Caffey.

[fol. 241] As by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord One thousand nine hundred and thirty-one, the said cause came on to be heard before the said United

Circuit Court of Appeals for the Second Circuit on the said transcript of record, and was argued by counsel.

On consideration whereof, it is hereby

Ordered, adjudged and decreed:

That the order of said District Court be and it hereby is reversed with costs, taxed at the sum of $345.10.

You therefore are hereby commanded that such further proceedings be had in said cause in accordance with the decision of this Court as according to the right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Hon. Charles Evans Hughes, Chief Justice of the United States, the twenty-ninth day of June in the year of our Lord Nineteen hundred and thirty-two.

Costs of Appellants:

Clerk	$24.70
Printing record	300.40
Attorney	20.00
	$345.10

William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[fol. 242] In United States District Court

E 60-94

Richard Reid Rogers, Plaintiff,

against

George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants

Richard Reid Rogers, Plaintiff,

against

Thomas R. Taylor and The American Tobacco Company, Defendants

Consolidated Cause

Decree Dismissing Complaint—July 8, 1932

A decree in the above-entitled consolidated cause having been entered in this Court on the 23rd day of March, 1932,

granting to the plaintiff herein an injunction pendente lite upon the giving by the plaintiff of a bond in the sum of $1,000, the condition thereof to be as prescribed by Section 382, Title 28, of the United States Code, enjoining The American Tobacco Company from making any further payments under By-Law XII of 1912 of the said Company to any President or Vice-President thereof, and the plain-[fol. 243] tiff having given said bond, and defendants George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company having taken an appeal from the said decree to the United States Circuit Court of Appeals for the Second Circuit, from which a mandate has duly issued to this Court reversing said decree of this Court, and it appearing from the decision of the said Circuit Court of Appeals that the said cause was adjudicated by said Circuit Court of Appeals in favor of the said defendants on the merits, it is hereby

Ordered that the said injunction pendente lite be and it is hereby vacated; and it is further

Ordered that the defendants George W. Hill, C. F. Neiley, Riggio, Thomas R. Taylor and The American Tobacco Company have judgment against the plaintiff, Richard Reid Rogers, that each of the bills of complaint herein be and the same is hereby dismissed upon the merits, at the cost of the plaintiff, which costs, including the costs of the Circuit Court of Appeals specified in said mandate, will be fixed by the Clerk against the said plaintiff, and for which, if not paid in ten days, execution will issue upon the application of any party in interest; and it is further

Ordered that the said defendants recover of the said plaintiff and the sureties on the injunction bond such damages not exceeding one thousand dollars in the aggregate as the several said defendants have suffered by reason of the issuing of said injunction pendente lite, and that this cause be referred to Benjamin V. Cohen, who is hereby appointed Special Master for that purpose, to ascertain and report to this Court what damages, if any, the several said defendants have suffered by reason of the injunction aforesaid.

J. W. Mack, U. S. C. J.

Entered July 8, 1932.

[fol. 244] In United States District Court

Equity 60-94

[Title omitted]

Consolidated Cause

Petition for Appeal and Order Allowing Same

The plaintiff above-named, conceiving himself aggrieved by the order and decree made and entered on the 8th day of July, 1932, in the above-entitled cause, dismissing the bills of complaint herein and granting certain other relief to the defendants, hereby appeals from said order and decree, and from each and every part as well as the whole thereof, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specifically set forth in the assignment of errors which is filed herewith; and he prays that the said appeal may be allowed, and after due hearing for such further relief as justice may require.

Dated New York ,N. Y., October 5th, 1932.

Richard Reid Rogers, Plaintiff, pro se. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

[fol. 245] It is ordered that the above-mentioned appeal be and it is hereby allowed on condition that the plaintiff file a bond as required by law in the sum of Two hundred and fifty dollars ($250) as security for costs on said appeal.

Dated New York, N. Y., Oct. 5, 1932.

Woolsey, U. S. D. J.

In United States District Court

Equity 60-94

[Title omitted]

Consolidated Cause

Assignment of Errors—Present Appeal

The plaintiff in the above-entitled cause in connection with his petition for the allowance of an appeal herein re-

spectfully makes the following assignment of errors which (in addition to other errors not hereby assigned) occurred [fol. 246] in the order and decree from which said appeal is taken, to-wit

1. The Court erred in dismissing the bills of complaint upon the merits.

2. The Court erred in failing to render judgment for the plaintiff for relief prayed for in the amended complaint.

3. The Court erred in dismissing the bills of complaint solely upon the mandate and decision of the Circuit Court of Appeals.

Wherefore the plaintiff prays that the order and decree of the District Court may be reversed, and for such other and further relief as justice may require.

Richard Reid Rogers, Plaintiff, pro se. Office & P. O. address: 74 Trinity Place, Borough of Manhattan, City of New York.

[fol. 247] In United States District Court

E 60-94

[Title omitted]

Consolidated Cause

Order as to Record—Nov. 1, 1932

The plaintiff having appealed to the Circuit Court of Appeals for the Second Circuit from the decree of the District Court for the Southern District of New York entered herein on the 8th day of July, 1932, and said plaintiff, appearing pro se, having duly served and filed his præcipe showing the papers proposed by him to be incorporated in the record on said appeal, and the defendants Hill, Neiley, [fol. 248] Riggio, Taylor and The American Tobacco Company, by their attorneys, Chadbourne, Stanchfield & Levy, having duly served and filed their counter præcipe for said record, and a difference having arisen between

the parties as to the contents of said record, and the plaintiff having moved this Court for an order settling the contents of said record and extending the time for the filing thereof; and said motion having come on to be heard, upon the notice of motion and the affidavit of Richard Reid Rogers sworn to on the 21st day of October, 1932, with proof of due service of said notice and affidavit upon counsel for said defendants, and upon the said præcipe and counter præcipe and the papers referred to therein; and after hearing the plaintiff, pro se, and Messrs. Chadbourne, Stanchfield & Levy, counsel for said defendants; and after due deliberation had in the premises; and it appearing that an extension of time to file said record is required in order that it may be prepared and printed in accordance with this order; it is

Ordered, That the record on appeal herein from the decree of the District Court for the Southern District of New York entered on the 8th day of July, 1932, to the Circuit Court of Appeals for the Second Circuit be and it hereby is settled to contain the following papers and no others, to-wit:

1. Statement of proceedings substantially in the same form as that annexed to the plaintiff's præcipe.

2. Statement prefixed to the record on the former appeal in this cause, viz., an appeal to the Circuit Court of Appeals from an order of this Court entered March 24, 1932.

3. Notice of motion in this Court returnable January 12, 1932.

[fol. 249] 4. Affidavit of Richard Reid Rogers in support of said motion.

5. Amended complaint in Rogers v. Hill et al., with exhibits thereto annexed.

6. Answer of defendants Hill, Neiley, Riggio, Taylor and The American Tobacco Company, with exhibit thereto annexed.

7. Order for further particulars.

8. Stipulation as to further particulars.

9. Bill of particulars with exhibits annexed thereto.

10. Affidavit of J. Arthur Leve referring to order of consolidation.

11. Order of consolidation.

12. Stipulation as to consolidation.

13. Complaint in Rogers v. Taylor et al., with exhibits thereto annexed.

14. Order for further particulars in Rogers v. Taylor et al.

15. Stipulation as to further particulars in Rogers v. Taylor et al.

16. Bill of particulars in Rogers v. Taylor et al., with exhibits thereto annexed.

17. Affidavit of James B. Harvie, sworn to January 13, 1932.

18. Opinion of Caffey, D. J., on aforesaid motion.

19. Order of District Court entered March 24, 1932.

20. Petition for appeal from said order entered March 24, 1932, and order thereon.

21. Assignment of errors on said appeal from order of March 24, 1932.

[fol. 250] 22. Stipulation as to record on said former appeal.

23. Order settling record on said former appeal.

24. Clerk's certificate as to record on said former appeal.

25. Majority opinion of Circuit Court of Appeals upon said former appeal.

26. Dissenting opinion of Swan, C. J., upon said former appeal.

27. Order of Circuit Court of Appeals for mandate to District Court upon said former appeal.

28. Mandate of Circuit Court of Appeals to District Court upon said former appeal.

29. Order and decree of District Court entered July 8, 1932, dismissing the bills of complaint and granting certain other relief to defendants.

30. Petition for appeal from said order and decree of July 8, 1932, with order allowing said appeal, signed October 5, 1932, and filed October 6, 1932.

31. Assignment of errors on said last-named appeal.

32. Stipulation as to correctness of transcript (if agreed upon).

33. Order of District Judge settling said transcript.

34. Clerk's certificate as to correctness of said transcript.

And be it

Further ordered that the time for filing the transcript of said record on appeal with the Clerk of the Circuit Court

of Appeals for the Second Circuit be and it hereby is extended until ten days after the entry of this order.

[fol. 251] Further ordered that defendants may have an exception to the making and contents of this order.

Francis G. Caffey, D. J.

In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing, except for the papers ordered not to be reprinted, constitute a true and correct transcript of the record of the United States District Court for the Southern District of New York in the above-entitled action on appeal from the decree of said District Court entered on the 8th day of July, 1932; provided that the appellees do not hereby waive any of the exceptions allowed them by the order of said District Court dated November 1, 1932, and filed and entered November 2, 1932.

Dated New York, N. Y., November 11, 1932.

Chadbourne, Stanchfield & Levy, Attorneys for Defendants-Appellees, George W. Hill, C. F. Neiley, V. Riggio, Thomas R. Taylor, and The American Tobacco Company. Richard Reid Rogers, Plaintiff-Appellant, pro se.

[fol. 252] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 253 & 253½] In United States Circuit Court of Appeals for the Second Circuit

Richard Reid Rogers, Plaintiff-Appellant,

against

George W. Hill, C. F. Neiley, V. Riggio, and The American Tobacco Company, Defendants-Appellees; and A. C. Mower and Charles A. Penn (Deceased), Defendants

RICHARD REID ROGERS, Plaintiff-Appellant,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Defendants-Appellees

Appeal from a Final Decree of the District Court for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Richard Reid Rogers, Esq., plaintiff-appellant, pro se.
Chadbourne, Stanchfield & Levy, Esqs., attorneys for appellees. Nathan L. Miller, Esq., of counsel.

OPINION

Per CURIAM:

Decree affirmed on the authority of Rogers v. Hill, 60 Fed. (2) 109 (C. C. A. 2).

A. N. HAND, J. (concurring):

I concur on the authority specified in the per curiam. With the matter open I should reach a different decision.

A. N. H.

[fol. 254] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

RICHARD REID ROGERS, Plaintiff-Appellant,

v.

GEORGE W. HILL et al., Defendants-Appellees, et al.

Same, Plaintiff-Appellant,

v.

THOMAS R. TAYLOR et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed Feb. 4, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 255] [File endorsement omitted.]

[fol. 256] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 257] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,429. U. S. Circuit Court of Appeals, Second Circuit. Term No. 732. Richard Reid Rogers, petitioner, vs. George W. Hill, A. C. Mower, Charles A. Penn, et al. Petition for a writ of certiorari and exhibit thereto. Filed February 25, 1933. File No. 37,429.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 732

RICHARD REID ROGERS,
Petitioner,
against
GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. RICCIO and THE AMERICAN TOBACCO COMPANY,
Respondents.

RICHARD REID ROGERS,
Petitioner,
against
THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY,
Respondents.

Consolidated Cause.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RICHARD REID ROGERS,
Petitioner, pro se.

EVAN SHELBY,
of Counsel.

The Heela Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-3420



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Supreme Court of the United States

OCTOBER TERM, 1932.

No. .

RICHARD REID ROGERS, Petitioner, against GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. RIGGIO and THE AMERICAN TOBACCO COMPANY, Respondents.	Consolidated Cause.
RICHARD REID ROGERS, Petitioner, against THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, Respondents.	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement.

This is a consolidation of two representative actions, both of which involve the same issues: (1) the validity of a

by-law, known as By-Law XII, adopted by the stockholders of The American Tobacco Company in 1912 whereby 10 per cent. of the net profits of the company over and beyond the sum of $8,222,245.82 (the estimated amount of net profits for 1910) were made payable 2½ per cent. to the president and 1½ per cent. to each of the five vice-presidents (R. pp. 61, 62); and (2) the question whether, if the by-law were valid, the other largely increased fixed salaries, and special compensations voted these officers by the directors, amounting to twice again as much as the profit distribution, did not render the total compensation payable to these officers unreasonable and exorbitant, and, therefore, under a well recognized principle of equity, subject to revision by the courts.

The original action was instituted March 30, 1931, in the Supreme Court of New York, The American Tobacco Company having declined to sue (R. p. 61), against that company, the president, Hill, and Penn, Neiley, Riggio and Mower, four of the five vice-presidents, all except Penn being citizens of New York. This action was removed to the United States District Court for the Southern District of New York by The American Tobacco Company of New Jersey and Penn of North Carolina upon the ground that it involved a separable controversy as to them. A motion to remand was denied November 6, 1931 (*Rogers* v. *American Tobacco Co.*, 53 Fed. [2d] 395). The second action was originally instituted in the United States District Court for the Southern District of New York May 28, 1931, by the petitioner, a citizen of New York, against The American Tobacco Company and Taylor, both citizens of New Jersey, on the ground of diverse citizenship (R. p. 2). On November 24, 1931, the two actions were consolidated, and it was ordered that the amended complaint in the first, or Hill action, should likewise serve as an amended complaint in the Taylor action; and that the answer filed in the Hill action should be deemed an answer in the Taylor action. The detailed facts set up in the amended complaint were ascertained as the result of an examination of

the company's books, contested as far as the Court of Appeals of New York (*Rogers* v. *The American Tobacco Co., Matter of,* 143 N. Y. Misc. Rep. 306, 309; 233 App. Div. 708), and were required to be set up either in a bill of particulars or amended complaint by order of the District Court (R. p. 113), so that the full facts might be presented by the pleadings, and the trial of the cause shortened.

The defendants having failed to move, the petitioner brought the matter on by a motion to (1) strike out the affirmative defenses for insufficiency, (2) for a decree upon the pleadings declaring the By-Law XII invalid, and for an accounting, or, (3) in the alternative, for an order enjoining The American Tobacco Company *pendente lite* from making any further payments under the by-law (R. p. 6).

On March 17, 1932, the District Court (Caffey, J.) handed down a decision, in which he stated that he was persuaded that the bill stated a cause of action, that he was bound to exercise jurisdiction, and that his present impressions were that the by-law was invalid and the defenses insufficient: but that it was desirable to obtain from the Circuit Court of Appeals an early authoritative ruling on the by-law and the separate defenses. He therefore confined his ruling to a single matter, i.e., the granting of an injunction *pendente lite*, restraining the tobacco company from making further payments under the by-law, reserving all other questions until the matter had been passed upon by a higher court (R. pp. 211-213). An order to this effect was entered (R. p. 214); the petitioner executed the bond required; and the defendants appealed from this interlocutory order to the Circuit Court of Appeals. The Circuit Court of Appeals, by a majority vote (Manton and Chase, JJ.; Swan, J., dissenting), reversed the order granting the injunction *pendente lite*. The mandate so provided, and nothing further (R. p. 241). The Circuit Court of Appeals, on a petition for rehearing, refused to further clarify the extent of its decision, and upon the coming down of the mandate, and upon the

mandate alone, without any further hearing, the District Court (Mack, J.) dismissed the entire case upon the merits (R. p. 243). Upon the second branch of the case, whether if the payments under the by-law were valid the total compensation received by the officers was excessive, the petitioner has never had his day in court.

From the final judgment on the mandate the petitioner appealed to the Circuit Court of Appeals; and on February 6, 1933, the decree below was affirmed on the authority of the opinion on the appeal from the interlocutory order (*Rogers* v. *Hill,* 60 Fed. [2d] 109). Judge Augustus Hand concurred on the authority specified in the *per curiam* opinion, saying, however, "With the matter open I should reach a different decision" (R. p. 253).

The petitioner to-day therefore stands in this singular case, that of the five Federal Judges who have passed upon the merits of his cause, three, to wit, Caffey, District Judge, Swan and Augustus Hand, Circuit Judges, have expressed the opinion that the complaint sets forth a cause of action, and inferentially, at least, that the separate defenses are insufficient. Two only, Manton and Chase, Circuit Judges, have decided against him; but their decision controls.

Up to the present time it has not seemed that the petitioner, under the orderly processes of the law, was in a position to apply for a writ of certiorari. The first decision merely reversed an interlocutory order and dissolved an injunction *pendente lite,* a discretionary matter. From reading the majority opinion, it was impossible to determine whether the intention was to dispose of the question of excessive salaries. The burden to support them was on the defendants (*Booth* v. *Land Co.,* 68 N. J. Eq. 536; *Davis* v. *Thomas,* 63 N. J. Eq. 572; *Gardner* v. *Butler,* 30 N. J. Eq. 702; *Schall* v. *Althaus,* 208 App. Div. 103, 106). A final decree having now been entered, and the petitioner having exhausted his remedies in the lower courts, the time seems appropriate to present this petition for a writ of *certiorari.*

There has been no change in the parties since the institution of this litigation, except that the defendant Charles A. Penn died October 22, 1931. A motion to revive the consolidated action against his executors was made, opposed and submitted, and is still held under advisement by the District Court. Service upon Mower has not been obtained.

Facts.

The central facts are as follows:

The American Tobacco Company was organized by merger in 1905, under a charter which contained the following provisions:

> "The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine" (R. pp. 30-31).
>
> * * * * * *
>
> "The power to make and alter by-laws of said merged corporation is conferred upon the directors" (R. p. 30).

Notwithstanding these provisions, at the annual meeting of the stockholders March 13, 1912, the stockholders adopted the following by-law, known as By-Law XII, the first and important section of which reads as follows:

> "SECTION 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company

> shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-fourth thereof or 2½ per cent of such amount to the President; one-fifth of the remainder thereof, or 1½ per cent of such amount to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers" (R. pp. 61-62).

Under this by-law there was paid to the defendant Hill, vice-president to April 6, 1926, and president thereafter, from $89,833.94 in 1921 to $842,507.72 in 1930 (R. p. 16). On January 2, 1932, although the accounts for the year had not been made up, there was paid to the president, as appears from the affidavit of the treasurer (R. p. 210), on account for the year 1931, $850,000. The payments to the senior vice-president, Penn, ran as high as $505,504.63 in 1930, and higher still in 1931. The payments to the junior vice-presidents were in proportion, and are set out in detail at the pages above referred to.

In addition to this profit sharing, the president received, by a vote of the directors, the following fixed annual salaries: To and including the year 1928, $75,000; for the year 1929, $144,500; for the year 1930, $168,000. In addition, he was voted by the directors for the year 1929 a cash credit of $136,507.71, and for the year 1930, $273,470.76. The first vice-president, Penn, received a fixed salary until 1929 of $45,000; in 1929 of $81,166.66; and in 1930 of $98,000. His cash credits for 1929 and 1930 were $90,702.81 and $181,708.12, respectively. The increase in salaries and credits to the other vice-presidents, except Taylor, were proportionate (R. p. 14). In addition, in 1931, the directors, who were themselves receiving a part of the stock on similar terms (see *Rogers* v. *Guaranty*

Trust Co., 53 Sup. Ct. Rep. 295), voted these officers, the individual defendants, shares of common stock B at $25 a share, when it had a market value of $112 a share, "by way of additional compensation for services to be rendered" from January 28 to December 31, 1931, as follows: To defendant Hill, 13,440 shares; to Penn, 8,025 shares; to Riggio, 4,000 shares; to Neiley, 3,000 shares; to Mower, 1,000 shares (R. p. 15); to Taylor, it was alleged on information and belief, 3,000 shares (R. p. 186); actually, when the facts were ascertained definitely, he was found to have received under 1,000 shares. While the legality of these payments is contested, they are all claimed to be valid by the defendants. Valuing the stock compensation for 1931 at the difference between purchase price and market and adding all other compensations, the total received by Hill in 1931 was approximately $2,627,978.48; by Penn, $1,587,712.75; by Mower, Neiley and Riggio, from $746,358 to $950,349 (R. p. 19).

While these increases in payments were running on, the stockholders were adding additional capital to the company. In 1929 they added $48,822,875 by subscription to 390,583 shares of common stock B created in 1920 (R. p. 18); and from the time of the adoption of By-Law XII to the time when the amended complaint was filed, contributed approximately $113,000,000 from surplus earnings.

The petitioner became a shareholder of common stock in 1917 and of common stock B in 1925, but had no actual knowledge of the profit distribution until litigation was begun; no disclosure of payments thereunder ever having been made by the company (R. p. 20).

Before presenting the reasons for the allowance of the writ, it may be appropriate, in view of the decision of this Court in *Rogers* v. *Guaranty Trust Co.*, to make the following observations concerning the

Jurisdiction of the Federal Courts in the Present Case.

All other questions apart, this case would seem to be one where under any circumstances the law of the *forum non conveniens* should not apply. While, of course, upon some of the questions which arise a reference to New Jersey statutes and decisions becomes important, the principal points presented involve questions of general law; as, for example, whether the charter contract of stockholders *inter sese* did not forbid a distribution of company profits to officers; whether the funds distributed were in fact a part of the profits; whether the stockholders were qualified to pass a by-law after having conferred that power by the express provision of the charter on the directors; whether a case has been presented for equitable revision of salaries; whether the petitioner has been denied due process of law by refusing him a hearing upon this important question. Very little reference to New Jersey law is necessary for the determination of these questions of general jurisprudence; and, moreover, where necessary, the law seems settled.

Moreover, a direct recovery of past payments as well as an injunction against future payments is sought of the principal individual defendants, most of whom are residents of New York, and could not be reached in New Jersey. Nor is there any *res* in New Jersey, as in the case of a stock issue such as was before the Court in *Rogers* v. *Guaranty Trust Co.*, which might afford relief against this situation. In truth, to send the petitioner into New Jersey would be to deny petitioner in effect all right of recovery for past payments, no matter how clear that right may be, and thus defeat justice, as it cannot be assumed the principal defendants would voluntarily subject themselves to the New Jersey Courts. There can be no doubt that under the authority of the leading case of *Ernst* v. *Rutherford*, 38 App. Div. 388, approved *in extenso* in *Miller* v. *Quincy*, 179 N. Y. 294, 301, the New York Courts, from which the *Hill* suit

was removed by certain defendants, would have retained jurisdiction of the cause. Similarly in New Jersey, as appears from the recent decision of Vice-Chancellor Bigelow in *Mayer* v. *Oxidation Products Co.*, 110 N. J. Eq. 141, where all the authorities are elaborately reviewed, the New Jersey courts would retain jurisdiction of an action such as this if brought there against a foreign corporation. The principles laid down in those cases would seem to be equally applicable in the Federal Court.

Apart from this general question, there are two special reasons why these cases should not be sent into New Jersey.

First: The Taylor action was originally brought in the Federal Court on the ground of diverse citizenship. Although it turned out that Taylor has actually received no payments under By-Law XII, he is potentially entitled to payment, and that action raises the same question against The American Tobacco Company as is raised against it in the *Hill* action, with which it was consolidated. The case therefore seems to be one, at least so far as the *Taylor* action is concerned, where the petitioner's constitutional right to resort to an impartial tribunal, to wit, a Federal Court, rather than the courts of the state of the corporate defendant is assured. As said in *Hyde* v. *Stone*, 20 How. 170, 175, the Federal Courts are bound to afford redress to suitors in every case to which their jurisdiction extends:

> "They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

See also:

Suydam v. *Broadnax*, 14 Pet. 67, 75;
Cohen v. *Virginia*, 6 Wheat. 264, 404;
Chicot v. *Sherwood*, 148 U. S. 529, 534;
McClellan v. *Carland*, 217 U. S. 268, 281;
Kline v. *Burke*, 260 U. S. 226, 230;
Canada Malting Co. v. *Paterson Steamships*, 285 U. S. 413, 422.

SECOND: The District Court, even if it had discretion in these cases, exercised it in favor of retaining jurisdiction and not in rejecting it; and according to *Rogers* v. *Guaranty Trust Company* it would seem that it is the discretion of the District Court which controls.

Petitioner presents the following

Reasons for Allowance of the Writ.

REASON I. Inasmuch as the charter of the company provided in effect that profits (1) could only be put into a reserve fund to be invested by the directors in property, or (2) be used to pay dividends, a distribution of these profits to officers, in addition to their fixed salaries, was a violation of the charter contract of the stockholders *inter sese,* which cannot be continued over the objection of a single stockholder. The holding of the majority of the Circuit Court of Appeals to the contrary is believed to be opposed to the decisions and statutes of New Jersey on an important question of local and general law and to the decisions of this Court on an important question of general law as well.

REASON II. The stockholders by the charter having delegated to the directors the entire authority to adopt by-laws were void of authority to adopt By-Law XII. The decision of the Circuit Court of Appeals to the contrary is believed to be opposed to an overwhelming weight of authority upon an important question of general law.

REASON III. The District Court granted an interlocutory order restraining The American Tobacco Company from making any further payments under By-Law XII until the case could be heard. The decree and the mandate of the Circuit Court of Appeals merely reversed this discretionary order. Without further hearing, on the mandate alone, the District Court thereupon entered a final decree dismissing the complaint upon the merits; and this final decree has now been affirmed by the Circuit Court of Appeals. Petitioner has never had a hearing

upon the second branch of his case, viz.: that if the payments under the by-law were valid, then the total compensation voted these officers, of which two-thirds was voted solely by the directors, was excessive and subject to equitable revision; and therefore has been denied due process of law.

REASON IV. Contemporaneously with the payments under By-Law XII, the directors increased the fixed salaries and voted additional special credits and stock benefits "as additional compensation" to the individual defendants and officers, amounting in 1931 to twice as much as the payments under the by-law. After the by-law was passed the stockholders also contributed $113,000,000 additional capital to the company, materially changing the equities between the stockholders and the officers as of the date of the by-law. In denying petitioner the right under these circumstances to have the total salary payments reviewed in equity, to determine whether they were unreasonable, the Circuit Court of Appeals decided against petitioner an important question of general law contrary to the great weight of authority.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the decree entered in the United States Circuit Court of Appeals for the Second Circuit on the 14th day of February, 1933, in the above-mentioned consolidated action, entitled in said Court "Richard Reid Rogers, Plaintiff-Appellee, against George W. Hill, A. C. Mower, Charles A. Penn, C. F. Neiley, V. Riggio and The American Tobacco Company, Defendants-Appellants; Richard Reid Rogers, Plaintiff-Appellee, against Thomas R. Taylor and The American Tobacco Company, Defendants-Appellants; Consolidated Cause."

Respectfully submitted,

RICHARD REID ROGERS,
Petitioner.

EVAN SHELBY,
of Counsel.

BRIEF IN SUPPORT OF PETITION.

REASON I.

Violation of Charter by By-Law XII.

A charter of course is recognized as a contract everywhere, but no state has gone farther in that regard than New Jersey. There the charter is not only a contract between the stockholders *inter sese,* but the contract may not be changed, except as to those matters which concern the public, by subsequent legislation, notwithstanding a reserved power to amend (*Kean* v. *Johnson,* 9 N. J. Eq. 401; *Zabriskie* v. *Hackensack Ry. Co.,* 18 N. J. Eq. 178, 191, 192; *Black* v. *Del. & Rar. Canal Co.,* 24 N. J. Eq. 456; *Mills* v. *The Central R. R.,* 41 N. J. Eq. 1; *Lowenthal* v. *Rubber Co.,* 52 N. J. Eq. 440, 441; *German Ins. Co.* v. *Schwarzwaelder,* 59 N. J. Eq. 589; *Re Newark Library Assn.,* 64 N. J. L. 217, 219; *Einstein* v. *Raritan Woolen Mills,* 74 N. J. Eq. 624, 629; *Itiso* v. *Met. Sav. & Loan Co.,* 68 N. J. L. 588, 590; *Colgate* v. *U. S. Leather Co.,* 75 N. J. Eq. 229, 239; *Riker* v. *United Drug Co.,* 79 N. J. Eq. 580, 583).

The provisions of the charter upon which petitioner relies are set out at page 5 of the petition. These provisions are enumerated in the charter itself under the head of "Limitations of Powers" (R. p. 28). It is the petitioner's contention that under those provisions the profits of the company can be applied only (1) to put into a reserve fund to acquire property as directed by the board, or (2) to the payment of dividends. Evidently this limitation of powers implies the exclusion of all others; particularly of the right to dispose of profits for any other than the specified purposes (*Central Transportation Co.* v. *Pullman Car Co.,* 139 U. S. 24, 48; *Somerville Water Co.* v. *Somerville,* 78 N. J. Eq. 199, 212).

In this connection, the language of the Court of Errors and Appeals of New Jersey in *Riker* v. *United Drug Co.*, 79 N. J. Eq. 580, 583, and of this Court in *Dodge* v. *Woolsey*, 18 How. 331, 341, 342, is particularly applicable.

In the *Riker* case, the Court of Errors and Appeals said:

> "Each stockholder of the company owns a share in its property and assets, and is entitled to have a proportionate share in its profits. They have invested their capital in it, and in it alone, and they are entitled to every dollar that it earns. This is the agreement of the stockholders among themselves. They each contract with the other that their money shall be employed for the purposes specified in the certificate of incorporation, and for no other purpose, and that the profits of the enterprise shall be ratably apportioned among them. In the absence of legislation permitting a variation of the provisions of this fundamental contract, by vote of a majority of the stockholders, no majority, however large, has the right to divert any part of the joint capital, however small, to any purpose not consistent with and growing out of this original, fundamental agreement" (citing *Black* v. *Del. & Raritan Canal Co.*, 24 N. J. Eq. 456, 463; *Mills* v. *Central Railroad Co.*, 41 Eq. 1; *Colgate* v. *U. S. Leather*, 75 Eq. 229).

Compare *Park* v. *Locomotive Works*, 40 N. J. Eq. 114, 119, where a contract provided that the "net profits" should be divided between the stockholders, and it was held that the directors had no right or judgment, but must perform the contract obligation.

In *Dodge* v. *Woolsey*, this Court, after observing that courts of equity have jurisdiction to prevent any misapplication of funds of a corporation "which might result in lessening the dividends of stockholders" even "though the misapplication be sanctioned by a vote of the majority," went on to say:

> "But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And

> therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied."

Now the majority opinion does not expressly dispute the construction of the charter, which to the petitioner seems so obvious. The opinion of Judge Swan, dissenting, states positively: "If it was really a distribution of profits rather than a method of compensation, the majority stockholders had no power to vote it" (R. p. 236). The majority attempts to meet the provisions of the charter by the following argument: "Compensation to officers of a corporation is an operating expense of the company, whether at a fixed salary or based upon a percentage of the profits, and until such expenditures are met there are no net profits of the corporation. It is the sum beyond this which constitutes the surplus, net profits or earnings referred to in this corporation's charter" (R. p. 229).

That what was distributed to the officers under By-Law XII, however, was in fact a share of the net profits, and not an expense item, as was their fixed salaries, appears (a) from the language of the notice to stockholders soliciting proxies for the meeting; (b) from the language of the By-Law itself, and (c) from the company's practice thereunder.

(a) In the notice sent out to the stockholders, it was distinctly stated:

> "At this meeting there will be presented for consideration, and action upon, a proposed by-law providing *for participation by certain officers of the company* IN PROFITS, if any, earned by the company in excess of profits earned during the year 1910 on the brands and businesses now owned by the company, not exceeding in the aggregate 10% of such excess" (R. p. 26).

The language of this notice, upon which proxies were solicited, is of great importance. It in effect limited the business to be transacted to the matter set out in the notice,

i. e., profit sharing, and not salary increase. Proxies could not be properly voted for any other than the noticed purpose (*Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 17, 24). See also *Schwarzwalder* v. *Tegen*, 58 N. J. Eq. 319, 325, and *Scott* v. *Lorillard*, 108 N. J. Eq., at page 160, affirmed by the Court of Errors and Appeals on the opinion below, 109 N. J. Eq. 417. See also *Rogers* v. *Guaranty Trust Co.*, 53 Sup. Ct. Rep., at pp. 300, 302.

(b) The by-law itself is equally explicit as to profit distribution. It says (R. p. 23):

> "As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain *the net profits, as hereinafter defined,* earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent. of such excess to the President and five Vice-Presidents of the Company in the following proportions."

The profits "hereinafter defined" are described in Section 3 (R. p. 62) to "consist of the net earnings made by the Company * * * *after* deducting all expenses and losses" plus depreciation and dividends on the preferred stock.

(c) In the accounting of the company, the bonus payments are likewise treated as profit distribution and not as an expense. The officers' percentage of the profits is calculated, not on the sum which remains *after* deducting the officers' 10 per cent. as a *previous* expense, as in the case of the true salaries, but upon the sum which remains *before* the 10 per cent. is deducted (see plaintiff's affidavit, R. p. 11; Defts.' Ex. A, R. p. 110). This is apparent from the figures showing the additional payment made defendant Hill for 1930, to wit, $842,507.72 (R. p. 16). This

was 2½ per cent. of the net profits over and beyond $11,369,000, or 2½ per cent. of $33,700,156. Had this additional payment been treated as an expense in the same sense as the fixed salary, it would have been calculated upon the sum left over *after* deducting it, and would therefore have been approximately 9 per cent. less than the amount Hill actually received, or $765,685, instead of $842,507.72. The other bonuses would have been reduced in the same proportions.

It is therefore impossible to consider the profit distribution an *expense* in the sense that a fixed salary was an expense, and to call it "salary for the year" does not change its essential character. As said in *Godley* v. *Crandall*, 212 N. Y., at page 127, in a parallel situation, "the amounts were paid at the end of each year from surplus profits."

It is evident therefore that what has been done in this case is a diversion of profits by way of bonuses to corporate officers, and this could not be done without the consent of every stockholder. Even if it could be said that such a proceeding was binding on a stockholder who voted for it, it could not have been binding on those who did not attend the meeting (*Kessler* v. *Ensley Co.*, 129 Fed. 397, 417; *Matter of Empire State*, 53 Misc. 344, 352; *Douglass* v. *Concord R. R.*, 72 N. H. 26, 31); and certainly not upon the great body of the holders of common B nonvoting stock, which was only created in 1920, and of which the plaintiff is the registered holder of 400 shares (R. p. 12).

Evidently the Legislature of New Jersey, which cannot be presumed to have done a vain or unnecessary act (*Sutherland on Statutory Construction*, Secs. 497, 499), had no idea that profit sharing was legal in 1912, for in 1920 it passed Chapter 175, Laws of 1920 (*Smith on N. J. Corp.*, p. 123) authorizing for the first time profit sharing; although from an examination of that law it would seem that the Legislature had in mind a general profit sharing among all employees, the words "any or all" employed in statutes of this kind being generally considered to have a broad distributive meaning (3 *C. J.*, p. 232).

But the important statute in this connection is the Act of 1932, Chapter 192, amending Chapter 175, Laws of 1920, as indicated by the words in italics:

> "The privileges and powers conferred by this Act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction as limitation of the powers now permitted to corporations of this State. *A resolution or by-law heretofore adopted by a majority vote of the stockholders of a corporation entitled to vote thereon shall be valid from the time of such adoption or approval to the extent it contains terms which might be embodied in a plan or plans authorized by this Act as amended.*"

It is evident on the face that this so-called curative act was introduced and passed to meet the very situation developed by this litigation. No Legislature on its own motion would go so far out of its way to pass an act of such limited application. The Act, however, as remedial legislation is plainly unconstitutional. It violates both the Constitutions of New Jersey and of the United States.

The Constitution of New Jersey contains the following provision (Art. 4, Sec. 7, par. 3):

> "The legislature shall not pass any * * * law impairing the obligation of contracts, or depriving a party of a remedy for enforcing a contract which existed when the contract was made."

Similarly Section 5 of the General Corporation Act (Smith, p. 74) provides as follows:

> "This act may be amended or repealed, at the pleasure of the legislature, and every corporation created under this act shall be bound by such amendment; but such amendment or repeal shall not take away or impair any remedy against any such corporation or its officers for any liability which shall have been previously incurred; this act and all amendments thereof shall be part of the charter of

> every corporation heretofore or hereafter formed hereunder, except so far as the same are inapplicable and inappropriate to the objects of such corporation."

Commenting on this matter, it has been said in New Jersey (*Rader* v. *Southeasterly Rd. Dist.*, 36 N. J. L. 273, 280) that any legislation, the effect of which is to deprive a party of the power to resort to the person or any property, which as the law was when the contract was made might have been taken or applied in satisfaction of his demand, is within the prohibition of the constitution prohibiting the passage of any law depriving a party of any remedy for enforcing a contract which existed when the contract was made; it being added that the very purpose of the insertion of this clause in the Constitution of 1844 was to meet the previous decisions of this Court drawing a distinction between the obligation of a contract and the remedies thereunder.

If it were possible to get by the Constitution and laws of New Jersey with this retroactive special legislation, it would be stopped by the contract clause of the Federal Constitution.

The Act of 1932, however, performs a very useful function in the determination of the question now under discussion. It plainly shows that there was no law in existence in 1912 which could have authorized By-Law XII; for why resort to legislation to validate what was already valid? The implication of original invalidity is manifest; and, as the invalidity rests upon a plain charter limitation, no subsequent legislation could cure it in any event.

In conclusion, it will be noted that this futile act speaks of a by-law adopted by a vote of stockholders "entitled to vote thereon"; and this brings us to

REASON II.

The stockholders by an express provision of the charter having delegated to the directors the power to adopt by-laws, lost all power to adopt By-Law XII.

The charter, it has been observed, expressly conferred on the directors the authority to make and alter by-laws (R. p. 30).

This provision in the charter was inserted by authority of the General Corporation Act of New Jersey (Laws of 1896, Chap. 185, Sec. 11; Smith, p. 184), which provided:

> "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in its certificate of incorporation, confer that power on the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders."

The authorities are uniform that where the charter contains such a provision the stockholders cannot enact a valid by-law.

In *Fletcher on Corporations*—the latest textbook on the subject—it is said (Sec. 4172):

> "The charter of the corporation may expressly vest such power [adoption of by-laws] in the governing board and when this is done, the by-laws, of course, must be adopted not by the stockholders or members, but by such board."

By-laws enacted by the stockholders in such case

> "are lacking in validity, or legal force and effect" (*id.*).

To the same effect is *Thompson on Corporations*, Section 1069, and *Corpus Juris*, Volume 14, page 353, Section 447.

See also, expressly in point:

Mfg. Bldg. Co. v. *Landay*, 219 Ill. 168, 174, 177;
People v. *Ittner*, 165 Ill. App. 360, 365;
Indiana ex rel. v. *Day*, 189 Ind. 243, 247;
In re Klaus, 67 Wisc. 401, 405;
Kaski v. *Kemppainen*, 110 Ore. 362, 367;
The King v. *Westwood*, 4 Barn & Cress. 781, 788;
Dunsmuir v. *Colonist Co.*, 9 Br. Col. 290, 293;
Colonial Ass. Co. v. *Smith*, 22 Man. 441, 445;
Kelly v. *Electrical Cont. Co.*, 16 Ont. 232, 239.

In the recent case of *Scott* v. *Lorillard*, 108 N. J. Eq. 153, 155, the same conclusion was reached on a consideration of the general corporation laws of New Jersey alone. The Vice-Chancellor said:

> "The stockholders may, of course, choose directors who will act in accord with their wishes. They may limit the authority of the latter pursuant to Section 8 (VII) but they cannot usurp the powers of the Board. Lowenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 446; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219. It should be noted that the directors have not formulated or approved the proposed by-law."

The Court of Errors and Appeals thought this statement unnecessary to the decision, and expressed no opinion on it one way or the other. It did not appear, however, in the *Lorillard* case that the power to pass by-laws had been delegated by the charter to the directors, as was done in the case at bar.

No majority of stockholders could impose a profit-sharing arrangement upon the minority stockholders in any form; but least of all by passing a by-law as to which the stockholders were *functus officio*. The sole power of the corporation toward its employees in this regard was confined to paying "suitable compensation" (G. C. A., Sec. 1-V; Smith, p. 96), and this was a matter of corporate management left to the directors to be reasonably exercised, subject to the ordinary liability of trustees for an abuse of power.

The point here is by no means technical. It is the unquestioned law in New Jersey, as nearly everywhere else, that corporate management resides solely with the directors. With this duty goes a corresponding obligation to the shareholders to administer the affairs of the company with wisdom and economy. The by-law, particularly as it in terms provided that it could only be repealed by action of the stockholders, relieved the directors of this fiducial responsibility. The bonus payments became enormous; certainly the $113,000,000 of new money that the stockholders contributed subsequently to the passage of this by-law, as well as the large increases in fixed salaries, and the other special benefits referred to at pages 6 and 7 of the petition, justified, if it did not demand, the reconsideration of this by-law by the directors in the exercise of sound administration. But the by-law absolutely disqualified them from the performance of this most elementary duty.

This exact point was raised in *Berendt* v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148, 149, 152, where the Court approved inferentially the charge made in that case that "though the stockholders fixed the percentage of bonus, it became the duty of the board of directors, whenever the bonus became excessive, to modify it to a basis of reasonable compensation * * * as they were in conscience bound to do."

It will be observed that the by-law provided as follows:

> "This By-Law may be modified or repealed only by action of the stockholders of the company and not by the directors."

How could the stockholders, especially in view of the express provision of the charter to the contrary, thus undertake to denude the directors of their statutory authority and rivet on the minority stockholders for all time this perpetual diversion of company profits? Most of all, how could they fasten this burden on the common B stockholders, brought into existence in 1920 only, whose financial interest is twice as large as the common stockholders, but who possess no voting rights? (R. p. 13).

In his dissent, Swan, J., said:

> "Here the directors have exercised no discretion; they rely upon a by-law to relieve them of that duty, and the by-law, as it now operates, results in so large a payment that the trial court thought it probably invalid as applied to future earnings" (R. p. 237).

REASONS III AND IV.

Denial of the right to an equitable revision of total compensation, even if By-Law XII were valid.

These two points are here considered together. Either the trial court, without authority, on a mandate merely reversing an injunctive order against further payments under the by-law pending litigation, denied the petitioner a hearing upon the second branch of his case, to wit, the revision of salaries, and thus denied him due process of law; or the Appellate Court, by affirming this decree dismissing the case upon the merits, notwithstanding the uncontroverted allegations of the complaint, has arrived at the same conclusion. The result in the end is the same, and, however arrived at, is opposed not only to the weight of authority but practically all reported authority.

The province of equity to revise excessive salaries and fix the reasonable compensation of officers is established by a long and unquestioned line of authorities. The following cases were cited in the dissenting opinion of Swan, J. (R. p. 237):

> *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411;
> *Collins* v. *Hite*, 109 W. Va. 79;
> *Wight* v. *Heublein*, 238 F. 321;
> *Nichols* v. *Olympia Veneer Co.*, 139 Wash. 305;
> *McKey* v. *Swenson*, 232 Mich. 505;
> *Lowman* v. *Harvey R. Pierce Co.*, 276 Pa. 382;

Scott v. *P. Lorillard Co.*, 108 N. J. Eq. 153, aff'd 109 N. J. Eq. 417;
Berendt v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148;
Stratis v. *Andreson*, 254 Mass. 536;
Ransome Concrete Machinery Co. v. *Moody*, 282 F. 29;
Church v. *Harnit*, 35 F. (2d) 499, 502;
Booth v. *Beattie*, 95 N. J. Eq. 776, aff'd 95 N. J. Eq. 776;
Putnam v. *Juvenile Shoe Corp.*, 307 Mo. 71.

To these may be added the following additional citations:

Mitchell v. *United Box Board & Paper Co.*, 72 N. J. Eq. 580, 585;
Gardner v. *Butler*, 30 N. J. Eq. 702 (Ct. Er. & Appls.);
Lillard v. *Oil Co.*, 70 N. J. Eq. 197, 204;
McMahon v. *Burdette Oil Co.*, 106 N. J. Eq. 79, 80;
Raynolds v. *Diamond Mills Co.*, 69 N. J. Eq. 299, 312;
Godley v. *Crandall*, 153 N. Y. App. Div. 697, 710;
Atwater v. *Elkhorn Co.*, 184 N. Y. App. Div. 253, 258;
Schall v. *Althans*, 208 N. Y. App. Div. 103, 106;
Decatur Land Co. v. *Palm*, 113 Ala. 531, 537;
Backus v. *Finkelstein*, 23 Fed. (2d) 531, 537.

The latest statement approved by the Court of Errors and Appeals in New Jersey in *Booth* v. *Beattie*, 95 N. J. Eq. 776, with reference to this subject, is as follows:

> "It [i. e., the resolution fixing the salaries] is not voidable at the option of a dissenting stockholder as are similar resolutions similarly passed by a board of directors, but it is reviewable in equity as to the fairness and reasonableness of the salary at

> the instance of such stockholder. The rule is that contracts made by a board of directors with one of their number are, regardless of merits, voidable at the option of a dissatisfied stockholder, while such contracts sanctioned by a majority of the stockholders will be set aside by the court if it is disadvantageous to the minority stockholders. Equity will investigate."

Another very clear statement of the rule is in the case of *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411, 422, cited in the dissenting opinion:

> "Where a board of directors votes excessive salaries to certain of its members who are officers or employees of the corporation, even though such action may subsequently be ratified at a stockholders' meeting, the action of the board is subject to review by a court in equity, and if the finding of the latter tribunal is that the salaries in question are exorbitant, it may determine the value of the services rendered by the officers or employees in question and restrain the corporation from paying the excess thereof."

The textwriters are to the same effect:

> *Fletcher on Private Corporations*, Sec. 2779;
> *Thompson on Corporations*, Secs. 1876, 1877;
> *Spellman on Corporate Directors*, Sec. 225.

Undoubtedly the sound reason for equitable interference in the matter of excessive salaries is that stated in Judge Swan's dissent, that if there is no relation between services rendered and payment made, it really amounts to a gift, "and the majority stockholders have no power to give away corporate property against the protest of the minority." (See also *Collins* v. *Hite*, 109 W. Va., at p. 83). The Court of Appeals in New York speaks of such excess payments as "without consideration" (*Godley* v. *Crandall*, at p. 128).

The principle of these authorities, to which practically none are opposed, was completely disregarded by the judgment below.

Bonus payments of $850,000 for one year, increased fixed salaries, special credits, and stock benefits voted by the directors running for the year 1931 in excess of $2,600,000 for the president alone, with payments to vice-presidents running from $746,000 to $1,587,000 (R. p. 19), were not sufficient, in the opinion of the majority of the Circuit Court of Appeals, to invoke this wholesome remedy. "Individual minority stockholders are not permitted to question the acts of directors * * * if they are done in good faith and in the exercise of honest judgment," say the majority of two Judges, although two other Circuit Judges are not in accord. But were these acts done in good faith and in the exercise of an honest judgment? Can a waste of corporate assets, such as the payment of exorbitant compensation to officers and directors undoubtedly is, be justified upon the ground that it is an act of good faith or sound discretion? The majority opinion says there are no charges of fraud. But fraud, if that be important, is a legal conclusion from facts properly pleaded. In *Godley* v. *Crandall*, 212 N. Y. 121, 132, where a similar contention was made, the Court replied: "But it is plain that the fraud consisted in the officers helping themselves to the funds of the corporation under the guise of salaries voted by themselves." Actual fraud, morover, in the situation here presented, is not controlling. "If a corporation cannot lawfully do a thing, it makes no difference how honestly its officers may attempt to accomplish it" (Bigelow, V. C., in the recent case of *Meyerhoff* v. *Bankers Securities Co.*, 105 N. J. Eq. 76, 84; see also *Mayer* v. *Oxidation Products Co.*, 110 N. J. Eq. 141, 156).

On this application it is not clear how far the petitioner should go into the matter of the separate defenses. The decisions below were not based upon any of these defenses. Nevertheless, they will be briefly reviewed.

SEPARATE DEFENSES.

The first defense is that the petitioner should have combined with two other stockholders and called a meeting to repeal the by-law. The petitioner's contention is that the by-law is invalid, and therefore does not need to be repealed. If valid, the total compensation is still subject to revision, and the principle invoked could not apply.

The second defense sets out that because the petitioner had previously criticized the management, attended the annual meeting of the company April 1, 1931, and voted against Mr. Hill together with holders of some 20,000 shares of stock, that he has ratified this particular transaction involved in a suit commenced March 30, 1931. The allegation that petitioner knew that unless the defendants were re-elected their connection with the company would have been severed is a complete *non sequitur*. There was at this meeting not only no direct ratification of the acts complained of, but not even the remotest implication of any approval or acquiescence in those acts. See, as expressly in point, *Continental Securities Co.* v. *Belmont*, 206 N. Y., at p. 17.

The third defense is the law of the *forum non conveniens*, which has already been discussed in the petition for the certiorari.

The fourth defense is *laches*. But without actual knowledge there can be no laches.

In *Endicott* v. *Marvel*, 81 N. J. Eq. 388, the following statement of the law was approved:

> "Laches is a defense only when the stockholder with a full knowledge of the facts has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense. Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to com-

> mence. * * * But it is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books. Moreover, it is the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay."

Paragraph 15 of the complaint (R. p. 20) alleges:

> "The plaintiff further avers that the various payments made under said by-law XII to the individual defendants herein were never disclosed to the stockholders of the said company by any official or other communication prior to February, 1931, when the plaintiff as a stockholder made an application to the Supreme Court to examine the books of the said company with respect to salaries and other benefits or payments made by said company to its officers, directors and employees, and that prior to said date he had no knowledge thereof."

Moreover, the wrong here was a continuing wrong (see *Hill* v. *Glasgow R. R. Co.*, 41 Fed. 610, 619 [Opinion by Howell E. Jackson, J.]; and *Lillard* v. *Oil Co.*, 70 N. J. Eq. 197, 211).

Compare *Pollitz* v. *Gould*, 202 N. Y. 11, 17; *Appleton* v. *Am. Smelting Co.*, 65 N. J. Eq. 375.

Federal Courts, moreover, usually apply the doctrine of *laches* in analogy to the statutes of limitations (*Kelly* v. *Boettcher*, 85 Fed. 55, 62; *Backus* v. *Nor. Pac. Ry. Co.*, 21 Fed. [2d] 4, 12), which in New York is ten years (Civ. Pr. Act, Sec. 53). See also *Pollitz* v. *Wabash Ry. Co.*, 207 N. Y. 113, 130.

The fifth separate defense sets forth the accomplishments of the directors in the administration of the company's affairs. But, in *Jacobson* v. *Brooklyn Lumber Co.*, 184 N. Y. 152, 161, dealing with a similar question, the Court of Appeals of New York said:

> "Neither the good faith, honesty, nor legality of the acts of officers of a corporation can be determined by ascertaining whether the market value

> of the capital stock of the corporation has increased or diminished during the time when said acts were performed. A corporation may lose money notwithstanding good, faithful honest endeavor by its officers, and it may increase its assets notwithstanding selfish and illegal acts by them."

See also *Rogers* v. *Guaranty Trust Co.*, 53 Sup. Ct. Rep., at p. 302.

Respectfully submitted,

RICHARD REID ROGERS,
Petitioner, *pro se.*

EVAN SHELBY,
of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 732.

RICHARD REID ROGERS,
Plaintiff-Petitioner,

against

GEORGE W. HILL, A. C. MOWER, CHARLES A. PEDEN, C. F. MEILEY, V. RIGGIO and THE AMERICAN TOBACCO COMPANY,
Defendants-Respondents.

Consolidated Cause.

RICHARD REID ROGERS,
Plaintiff-Petitioner,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY,
Defendants-Respondents.

BRIEF ON BEHALF OF PLAINTIFF-PETITIONER.

RICHARD REID ROGERS,
Petitioner, pro se.

EVAN SHELLEY,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 732.

RICHARD REID ROGERS,
Plaintiff-Petitioner,

against

GEORGE W. HILL, A. C. MOWER, CHARLES A. PENN, C. F. NEILEY, V. RIGGIO and THE AMERICAN TOBACCO COMPANY,
Defendants-Respondents.

RICHARD REID ROGERS,
Plaintiff-Petitioner,

against

THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY,
Defendants-Respondents.

Consolidated Cause.

BRIEF ON BEHALF OF PLAINTIFF-PETITIONER.

Statement.

This is a consolidation of two representative actions, both of which involve the same issues: (1) the validity of a by-law, known as By-Law XII, adopted by the stockholders of The American Tobacco Company in 1912 whereby 10 per cent. of the net profits of the company over and beyond the sum of $8,222,245.82 (the estimated amount of net

profits for 1910) were made payable 2½ per cent. to the president and 1½ per cent. to each of the five vice-presidents (R. pp. 61, 62)*; and (2) the question whether, if the by-law were valid, the other largely increased fixed salaries, and special compensations voted these officers by the directors, amounting to twice again as much as the profit distribution, did not render the total compensation payable to these officers unreasonable and exorbitant, and, therefore, under a well-recognized principle of equity, subject to revision by the courts.

The original action was instituted March 30, 1931, in the Supreme Court of New York, The American Tobacco Company having declined to sue (R. p. 61), against that company, the president, Hill, and Penn, Neiley, Riggio and Mower, four of the five vice-presidents, all except Penn being citizens of New York. This action was removed to the United States District Court for the Southern District of New York by The American Tobacco Company of New Jersey and Penn of North Carolina upon the ground that it involved a separable controversy as to them. A motion to remand was denied November 6, 1931 (*Rogers* v. *American Tobacco Co.*, 53 Fed. [2d] 395). The second action was originally instituted in the United States District Court for the Southern District of New York May 28, 1931, by the petitioner, a citizen of New York, against The American Tobacco Company and Taylor, both citizens of New Jersey, on the ground of diverse citizenship (R. p. 2). On November 24, 1931, the two actions were consolidated, and it was ordered that the amended complaint in the first, or Hill, action should likewise serve as an amended complaint in the Taylor action; and that the answer filed in the Hill action should be deemed an answer in the Taylor action. The detailed facts set up in the amended complaint were ascertained as the result of an examination of the company's books, contested as far as the Court of Appeals of New York (*Rogers* v. *The American Tobacco Co., Matter of,* 143 N. Y. Misc. Rep. 306, 309; 233 App.

* All Record references are to side page numbers.

Div. 708), and were required to be set up either in a bill of particulars or amended complaint by order of the District Court (R. p. 113), so that the full facts might be presented by the pleadings, and the trial of the cause shortened.

The defendants having failed to move, the petitioner brought the matter on by a motion (1) to strike out the affirmative defenses for insufficiency, (2) for a decree upon the pleadings declaring the By-Law XII invalid, and for an accounting, or, (3) in the alternative, for an order enjoining The American Tobacco Company *pendente lite* from making any further payments under the by-law (R. p. 6).

On March 17, 1932, the District Court (Caffey, J.) handed down a decision, in which he stated that he was persuaded that the bill stated a cause of action, that he was bound to exercise jurisdiction, and that his present impressions were that the by-law was invalid and the defenses insufficient; but that it was desirable to obtain from the Circuit Court of Appeals an early authoritative ruling on the by-law and the separate defenses. He therefore confined his ruling to a single matter, i. e., the granting of an injunction *pendente lite,* restraining the tobacco company from making further payments under the by-law, reserving all other questions until the matter had been passed upon by a higher court (R. pp. 211-213). An order to this effect was entered (R. p. 214); the petitioner executed the bond required; and the defendants appealed from this interlocutory order to the Circuit Court of Appeals. The Circuit Court of Appeals, by a majority vote (Manton and Chase, JJ.; Swan, J., dissenting), reversed the order granting the injunction *pendente lite.* The mandate so provided, and nothing further (R. p. 241). The Circuit Court of Appeals, on a petition for rehearing, refused to further clarify the extent of its decision, and upon the coming down of the mandate, and upon the mandate alone, without any further hearing, the District Court (Mack, J.) dismissed the entire case upon the merits (R. p. 243). Upon the second branch of the case,

whether if the payments under the by-law were valid the total compensation received by the officers was excessive, the petitioner has never had his day in court.

From the final judgment on the mandate the petitioner appealed to the Circuit Court of Appeals; and on February 6, 1933, the decree below was affirmed on the authority of the opinion on the appeal from the interlocutory order (*Rogers* v. *Hill*, 60 Fed. [2d] 109). Judge Augustus Hand concurred on the authority specified in the *per curiam* opinion, saying, however, "With the matter open I should reach a different decision" (R. p. 253).

Of the five Federal Judges who have passed upon the merits of this cause, three, to wit, Caffey, District Judge, Swan and Augustus Hand, Circuit Judges, therefore, have expressed the opinion that the complaint sets forth a cause of action, and inferentially, at least, that the separate defenses are insufficient. Two only, Manton and Chase, Circuit Judges, have decided against him; but their decision to the present controls.

There has been no change in the parties since the institution of this litigation, except that the defendant Charles A. Penn died October 22, 1931. A motion to revive the consolidated action against his executors was made, opposed and submitted, and is still held under advisement by the District Court. Service upon Mower has not been obtained.

Facts.

The central facts are as follows:

The American Tobacco Company was organized by merger in 1905, under a charter which contained the following provisions:

> "The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying

any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine" (R. pp. 30-31).

* * * * * * *

"The power to make and alter by-laws of said merged corporation is conferred upon the directors" (R. p. 30).

Notwithstanding these provisions, at the annual meeting of the stockholders March 13, 1912, the stockholders adopted the following by-law, known as By-Law XII, the first and important section of which reads as follows:

"SECTION 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-fourth thereof or 2½ per cent of such amount to the President; one-fifth of the remainder thereof, or 1½ per cent of such amount to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers" (R. pp. 61-62).

Under this by-law there was paid to the defendant Hill, vice-president to April 6, 1926, and president thereafter, from $89,833.94 in 1921 to $842,507.72 in 1930 (R. p. 16). On January 2, 1932, although the accounts for the year had not been made up, there was paid to the president, as appears from the affidavit of the treasurer (R. p. 210),

on account for the year 1931, $850,000. The payments to the senior vice-president, Penn, ran as high as $505,504.63 in 1930, and higher still in 1931. The payments to the junior vice-presidents were somewhat less, and are set out in detail at the pages above referred to.

In addition to this profit sharing, the president received, by a vote of the directors, the following fixed annual salaries: To and including the year 1928, $75,000; for the year 1929, $144,500; for the year 1930, $168,000. In addition, he was voted by the directors for the year 1929 a cash credit of $136,507.71, and for the year 1930, $273,470.76. The first vice-president, Penn, received a fixed salary until 1929 of $45,000; in 1929 of $81,166.66; and in 1930 of $98,000. His cash credits for 1929 and 1930 were $90,702.81 and $181,708.12, respectively. The increase in salaries and credits to the other vice-presidents, except Taylor, were proportionate (R. p. 14). In addition, in 1931, the directors, who were themselves receiving a part of the stock on similar terms (see *Rogers* v. *Guaranty Trust Co.,* 53 Sup. Ct. Rep. 295), voted these officers, the individual defendants, shares of common stock B at $25 a share, when it had a market value of $112 a share, "by way of additional compensation for services to be rendered" from January 28 to December 31, 1931, as follows: To defendant Hill, 13,440 shares; to Penn, 8,025 shares; to Riggio, 4,000 shares; to Neiley, 3,000 shares; to Mower, 1,000 shares (R. p. 15); to Taylor, it was alleged on information and belief, 3,000 shares (R. p. 186); actually, when the facts were ascertained definitely, he was found to have received under 1,000 shares. While the legality of these payments is contested, they are all claimed to be valid by the defendants. Valuing the stock compensation for 1931 at the difference between purchase price and market and adding all other compensations, the total received by Hill in 1931 was approximately $2,627,978.48; by Penn, $1,587,712.75; by Mower, Neiley and Riggio, from $746,358 to $950,349 (R. p. 19).

While these increases in payments were running on, the stockholders were adding additional capital to the com-

pany. In 1929 they added $48,822,875 by subscription to 390,583 shares of common stock B created in 1920 (R. p. 18); and from the time of the adoption of By-Law XII to the time when the amended complaint was filed, contributed approximately $113,000,000 from surplus earnings.

The petitioner became a shareholder of common stock in 1917 and of common stock B in 1925, but had no actual knowledge of the profit distribution until litigation was begun; no disclosure of payments thereunder ever having been made by the company (R. p. 20).

Although the respondents in opposition to the petition for a *certiorari* state that "no question of Federal jurisdiction is presented," it may be appropriate, in view of the decision of this Court in *Rogers* v. *Guaranty Trust Co.*, to make the following observations concerning the

Jurisdiction of the Federal Courts in the Present Case.

All other questions apart, this case would seem to be one where under any circumstances the law of the *forum non conveniens* should not apply. While, of course, upon some of the questions which arise a reference to New Jersey statutes and decisions becomes important, the principal points presented involve questions of general law; as, for example, whether the charter contract of stockholders *inter sese* did not forbid a distribution of company profits to officers; whether the funds distributed were in fact a part of the profits; whether the stockholders were qualified to pass a by-law after having conferred that power by the express provision of the charter on the directors; whether a case has been presented for equitable revision of salaries; whether the petitioner has been denied due process of law by refusing him a hearing upon this important question. Very little reference to New Jersey law is necessary for the determination of these questions of general jurisprudence; and, moreover, where necessary, the law seems settled.

Moreover, a direct recovery of past payments as well as an injunction against future payments is sought of the principal individual defendants, most of whom are residents of New York, and could not be reached in New Jersey. Nor is there any *res* in New Jersey, as in the case of a stock issue such as was before the Court in *Rogers* v. *Guaranty Trust Co.*, which might afford relief against this situation. In truth, to send the petitioner into New Jersey would be to deny petitioner in effect all right of recovery for past payments, no matter how clear that right may be, and thus defeat justice, as it cannot be assumed the principal defendants would voluntarily subject themselves to the New Jersey Courts. There can be no doubt that under the authority of the leading case of *Ernst* v. *Rutherford*, 38 App. Div. 388, approved *in extenso* in *Miller* v. *Quincy*, 179 N. Y. 294, 301, the New York Courts, from which the *Hill* suit was removed by certain defendants, would have retained jurisdiction of the cause. Similarly in New Jersey, as appears from the recent decision of Vice-Chancellor Bigelow in *Mayer* v. *Oxidation Products Co.*, 110 N. J. Eq. 141, where all the authorities are elaborately reviewed, the New Jersey Courts would retain jurisdiction of an action such as this if brought there against the officers of a foreign corporation.

Ernst v. *Rutherford* was an action brought in New York by a resident stockholder against the directors of a foreign corporation to hold them to an account for misappropriation of stock of the company. Refuting the position taken by the lower Court that the action was thus one to control the internal management of a foreign corporation, and that therefore jurisdiction should not be assumed, Judge Cullen said:

> "If the illegal acts of the directors or of the corporation offended solely against the majesty of the State to which it owed its life, in other words, constituted only public wrongs, the proposition is probably correct; for we are not compelled, nor should we entertain actions simply to redress the

> outraged dignity of foreign governments. But if such illegal acts also cause injury to the property rights of individual stockholders who are citizens of this State, we cannot see why they are not entitled to obtain full relief in our courts, so far as such relief can be accomplished by acting directly on the persons of the defendants. A contrary rule would, in our judgment, be unfortunate at this time, when, for some reason, the majority of corporate enterprises in this State (those of a quasi public nature, such as railroads, etc., excepted) are carried on under incorporations effected under the laws of other States."

In *Mayer* v. *Oxidation Products Co.*, the decision of the New Jersey Court was as follows:

> "The court of chancery has jurisdiction of a suit brought by a stockholder as a representative of a foreign corporation to prevent the diversion of property from the proper purposes of the corporation or to obtain an accounting and restitution. This jurisdiction does not depend upon fraud but exists even though the diversion was accomplished or is threatened in good faith."

The principles laid down in these cases would seem to be equally applicable in the Federal Court.

Apart from this general question, there are two special reasons why these cases should not be sent into New Jersey.

FIRST: The *Taylor* action was originally brought in the Federal Court on the ground of diverse citizenship. Although it turned out that Taylor has actually received no payments under By-Law XII, he is potentially entitled to payment, and that action raises the same question against The American Tobacco Company as is raised against it in the *Hill* action, with which it was consolidated. The case therefore seems to be one, at least so far as the *Taylor* action is concerned, where the petitioner's constitutional right to resort to an impartial tribunal, to

wit, a Federal Court, rather than the courts of the State of the corporate defendant is assured. As said in *Hyde* v. *Stone*, 20 How. 170, 175, the Federal Courts are bound to afford redress to suitors in every case to which their jurisdiction extends:

> "They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

See also:

> *Suydam* v. *Broadnax*, 14 Pet. 67, 75;
> *Cohen* v. *Virginia*, 6 Wheat. 264, 404;
> *Chicot* v. *Sherwood*, 148 U. S. 529, 534;
> *McClellan* v. *Carland*, 217 U. S. 268, 281;
> *Kline* v. *Burke*, 260 U. S. 226, 230;
> *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413, 422.

SECOND: The District Court, even if it had discretion in these cases, exercised it in favor of retaining jurisdiction and not in rejecting it; and according to *Rogers* v. *Guaranty Trust Co.* it would seem that it is the discretion of the District Court which controls.

The following errors were specified in the application for the writ of *certiorari*, and will be discussed in the order presented:

POINT I. Inasmuch as the charter of the company provided in effect that profits (1) could only be put into a reserve fund to be invested by the directors in property, or (2) be used to pay dividends, a distribution of these profits to officers, in addition to their fixed salaries, was a violation of the charter contract of the stockholders *inter sese*, which cannot be continued over the objection of a single stockholder.

POINT II. The stockholders by the charter having delegated to the directors the entire authority to adopt by-laws were void of authority to adopt By-Law XII.

POINT III. The District Court granted an interlocutory order restraining The American Tobacco Company from making any further payments under By-Law XII until the case could be heard. The decree and the mandate of the Circuit Court of Appeals merely reversed this discretionary order. Without further hearing, on the mandate alone, the District Court thereupon entered a final decree dismissing the complaint upon the merits; and this final decree has now been affirmed by the Circuit Court of Appeals. Petitioner has never had a hearing upon the second branch of his case, viz.: that if the payments under the by-law were valid, then the total compensation voted these officers, of which two-thirds was voted solely by the directors, was excessive and subject to equitable revision; and therefore has been denied due process of law.

POINT IV. Contemporaneously with the payments under By-Law XII, the directors increased the fixed salaries and voted additional special credits and stock benefits "as additional compensation" to the individual defendants and officers, amounting in 1931 to twice as much as the payments under the by-law. After the by-law was passed the stockholders also contributed $113,000,000 additional capital to the company, materially changing the equities between the stockholders and the officers as of the date of the by-law. In denying petitioner the right under these circumstances to have the total salary payments reviewed in equity, to determine whether they were unreasonable, the Circuit Court of Appeals decided against petitioner an important question of general law contrary to the great weight of authority.

POINT I.

Violation of Charter by By-Law XII.

A charter, of course, is recognized as a contract everywhere, but no State has gone farther in that regard than New Jersey. There the charter is not only a contract between the stockholders *inter sese*, but the contract may not be changed, except as to those matters which concern the public, by subsequent legislation, notwithstanding a reserved power to amend (*Kean* v. *Johnson*, 9 N. J. Eq. 401; *Zabriskie* v. *Hackensack Ry. Co.*, 18 N. J. Eq. 178, 191, 192; *Black* v. *Del. & Rar. Canal Co.*, 24 N. J. Eq. 456; *Mills* v. *The Central R. R.*, 41 N. J. Eq. 1; *Lowenthal* v. *Rubber Co.*, 52 N. J. Eq. 440, 441; *German Ins. Co.* v. *Schwarzwaelder*, 59 N. J. Eq. 589; *Re Newark Library Assn.*, 64 N. J. L. 217, 219; *Einstein* v. *Raritan Woolen Mills*, 74 N. J. Eq. 624, 629; *Itiso* v. *Met. Sav. & Loan Co.*, 68 N. J. L. 588, 590; *Colgate* v. *U. S. Leather Co.*, 75 N. J. Eq. 229, 239; *Riker* v. *United Drug Co.*, 79 N. J. Eq. 580, 583).

The provisions of the charter upon which petitioner relies are set out at page 4 of this brief. These provisions are enumerated in the charter itself under the head of "Limitations of Powers" (R. p. 28). It is the petitioner's contention that under those provisions the profits of the company can be applied only (1) to put into a reserve fund to acquire property as directed by the board, or (2) to the payment of dividends. Evidently this limitation of powers implies the exclusion of all others; particularly of the right to dispose of profits for any other than the specified purposes (*Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24, 48; *Somerville Water Co.* v. *Somerville*, 78 N. J. Eq. 199, 212).

In this connection, the language of the Court of Errors and Appeals of New Jersey in *Riker* v. *United Drug Co.*, 79 N. J. Eq. 580, 583, and of this Court in *Dodge* v. *Woolsey*, 18 How. 331, 341, 342, is particularly apposite.

In the *Riker* case, the Court of Errors and Appeals said:

> "Each stockholder of the company owns a share in its property and assets, and is entitled to have a proportionate share in its profits. They have invested their capital in it, and in it alone, and they are entitled to every dollar that it earns. This is the agreement of the stockholders among themselves. They each contract with the other that their money shall be employed for the purposes specified in the certificate of incorporation, and for no other purpose, and that the profits of the enterprise shall be ratably apportioned among them. In the absence of legislation permitting a variation of the provisions of this fundamental contract, by vote of a majority of the stockholders, no majority, however large, has the right to divert any part of the joint capital, however small, to any purpose not consistent with and growing out of this original, fundamental agreement" (citing *Black* v. *Del. & Raritan Canal Co.*, 24 N. J. Eq. 456, 463; *Mills* v. *Central Railroad Co.*, 41 Eq. 1; *Colgate* v. *U. S. Leather*, 75 Eq. 229).

Compare *Park* v. *Locomotive Works*, 40 N. J. Eq. 114, 119, where a contract provided that the "net profits" should be divided between the stockholders, and it was held that the directors had no right or judgment, but must perform the contract obligation.

In *Dodge* v. *Woolsey*, this Court, after observing that courts of equity have jurisdiction to prevent any misapplication of funds of a corporation "which might result in lessening the dividends of stockholders" even "though the misapplication be sanctioned by a vote of the majority," went on to say:

> "But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied."

The majority opinion does not expressly dispute the construction of the charter, which to the petitioner seems so obvious; while upon the other hand Judge Swan, dissenting, states positively: "If it was really a distribution of profits rather than a method of compensation, the majority stockholders had no power to vote it" (R. p. 236). The majority attempts to offset the provisions of the charter by the following argument: "Compensation to officers of a corporation is an operating expense of the company, whether at a fixed salary or based upon a percentage of the profits, and until such expenditures are met there are no net profits of the corporation. It is the sum beyond this which constitutes the surplus, net profits or earnings referred to in this corporation's charter" (R. p. 229).

That what was distributed to the officers under By-Law XII, however, was in fact a share of the net profits, and not an expense item, as was their fixed salaries, appears (a) from the language of the notice to stockholders soliciting proxies for the meeting; (b) from the language of the By-Law itself; and (c) from the company's practice thereunder.

(a) In the notice sent out to the stockholders, it was distinctly stated:

> "At this meeting there will be presented for consideration, and action upon, a proposed by-law providing *for participation by certain officers of the company* IN PROFITS, if any, earned by the company in excess of profits earned during the year 1910 on the brands and businesses now owned by the company, not exceeding in the aggregate 10% of such excess" (R. p. 26).

The language of this notice, upon which proxies were solicited, is of great importance. It in effect limited the business to be transacted to the matter set out in the notice, i. e., profit sharing, and not salary increase. Proxies could not be properly voted for any other than the noticed purpose (*Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 17, 24). See also *Schwarzwalder* v. *Tegen*, 58 N. J. Eq. 319, 325, and

Scott v. *Lorillard,* 108 N. J. Eq., at page 160, affirmed by the Court of Errors and Appeals on the opinion below, 109 N. J. Eq. 417. See also *Rogers* v. *Guaranty Trust Co.,* 53 Sup. Ct. Rep., at pages 300, 302.

(b) The by-law itself is equally explicit as to profit distribution. It says (R. p. 23):

> "As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain *the net profits, as hereinafter defined,* earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent. of such excess to the President and five Vice-Presidents of the Company in the following proportions."

The net profits "hereinafter defined" are described in Section 3 (R. p. 62) to "consist of the net earnings made by the Company * * * *after* deducting all expenses and losses" plus depreciation and dividends on the preferred stock.

(c) In the accounting of the company, the bonus payments are likewise treated as profit distribution and not as an expense. The officers' percentage of the profits is calculated, not on the sum which remains *after* deducting the officers' 10 per cent. as a *previous* expense, as in the case of the true salaries, but upon the sum which remains *before* the 10 per cent. is deducted (see plaintiff's affidavit, R. p. 11; Defts.' Ex. A, R. p. 110). This is apparent from the figures showing the additional payment made defendant Hill for 1930, to wit, $842,507.72 (R. p. 16). This was 2½ per cent. of the net profits over and beyond $11,369,000, or 2½ per cent. of $33,700,156. Had this additional payment been treated as an expense in the same sense as the fixed salary, it would have been calculated

upon the sum left over *after* deducting it, and would therefore have been approximately 9 per cent. less than the amount Hill actually received, or $765,685, instead of $842,507.72. The other bonuses would have been reduced in the same proportions.

It is therefore impossible to consider the profit distribution an *expense* in the sense that a fixed salary was an expense, and to call it "salary for the year" does not change its essential character. As said in *Godley* v. *Crandall*, 212 N. Y., at page 127, in a parallel situation, "the amounts were paid at the end of each year from surplus profits." See also *Schall* v. *Althaus*, 208 App. Div., at page 106; *Lofland* v. *Cahall*, 13 Del. Ch., at page 391.*

It is evident therefore that what has been done in this case is a diversion of profits by way of bonuses to corporate officers, and this could not be done without the consent of every stockholder. Even if it could be said that such a proceeding was binding on a stockholder who voted for it, it could not have been binding on those who did not attend the meeting (*Kessler* v. *Ensley Co.*, 129 Fed. 397, 417; *Matter of Empire State*, 53 Misc. 344, 352; *Douglass* v. *Concord R. R.*, 72 N. H. 26, 31); and certainly not upon the great body of the holders of common B non-voting stock, which was only created in 1920, and of which the plaintiff is the registered holder of 400 shares (R. p. 12).

The assertion of the majority of the Circuit Court of Appeals that compensation to officers is an *operating expense*, whether based upon a fixed salary or a percentage of profits, and that until such expenses are met there are no net profits, does not advance the argument. That statement merely assumes the point to be proved. When applied to the fixed salaries it may hold true; but to say that the profits to the company are the profits which remain after deducting a share of the profits, is a *reductio ad absurdum*. That the net profits of the company upon which the officers' percentage was designed to be calculated did not in fact

* The answers of the defendants likewise characterize these bonuses as "participation in profits" (R. p. 106).

consist of the remainder left over after deducting their share of such profits as an expense item, is quite evident from the by-law itself; because, as stated, the net profits were to be arrived at "after deducting all expenses and losses," and hence by definition net profits could not constitute any part of those expenses in themselves. If they were properly an expense item the officers have been overpaid as above set forth.

The foregoing criticism is equally applicable to the case of *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320, upon which the respondents chiefly rely. There the president had made a contract with an outside party to pay him $2,500 and one-sixth of the clear net profits. The Court, not a court of last resort, upheld the agreement because this one-sixth was "not part of the profits but part of the expenses of the business"—thus disregarding the long-recognized distinction between profits and working expenses (see *Eyster* v. *Centennial Board of Finance*, 94 U. S. 500, 503; *Harrison* v. *London Assur. Corp.*, 10 App. Cas. 438, 450), and confusing one with the other. But apart from this criticism that case is not an authority here, because there was no such prohibition in the charter of the company there before the Court as is found in the case at bar.

The petitioner's position is based primarily upon the provisions of the charter. If the charter contract inhibits a distribution of profits as a bonus or reward, it would make little difference whether under the general laws of New Jersey in force when the by-law was passed profit distribution was permissible or not. There is, however, convincing evidence that no such general permission existed in New Jersey prior to the enactment of Chapter 175 of the Laws of 1920. That act for the first time authorized New Jersey corporations, free to do so, to put into effect profit sharing by pursuing the detailed method therein prescribed. The Legislature of New Jersey cannot be presumed to have done a vain or unnecessary thing (Sutherland on Statutory Construction, Secs. 497, 499),

and evidently it would not have enacted Chapter 175, Laws 1920, authorizing profit sharing, had such grant of power been unnecessary.

Up to that time the sole power of New Jersey corporations with respect to the compensation of officers was embraced in par. V, Sec. 1, G. C. A. of 1896 (Smith, p. 96), which empowered them "to appoint such officers and agents as the business of the corporation shall require and allow them suitable compensation." What the words "suitable compensation" mean in this connection has never been judicially defined either in New Jersey or elsewhere. That the word "suitable" implies a limitation is evident, else it would not have been employed. In other connections the word "suitable" has been construed as being the equivalent of "reasonable." (*State* v. *Burkhardt*, 44 S. Dak. 285, 292; *Davis* v. *Northwestern R. R. Co.*, 75 S. C. 303, 306.)

Moreover, the word "compensation" would in itself seem to exclude the idea of profit sharing. Suitable compensation in the present case was undoubtedly the fixed salaries of the officers (see par. 6, Amended Complaint [R. p. 14]) and these are nowhere claimed to have been inadequate or unsuitable in themselves. If at any time there had been no profits to divide, their salaries still would have remained a suitable and accepted compensation for the services performed; which goes to show that profit sharing was something over and above suitable compensation, and hence a gratuity.

Certain it is that the management itself in practice has not esteemed these bonuses an incentive to greater efficiency of service. When Mr. Taylor, the latest vice-president, was elected by the directors he was cut off from all profit participation, notwithstanding the positive injunction of the by-law (see Answer, R. p. 75). When Messrs. Neiley and Riggio were selected they were cut down approximately $150,000 annually each below the 1½ per cent. they were entitled to under the terms of the by-law (R. p. 16). Where their own personal interests were not

involved, the directors could easily see the wisdom of reducing these enormous and unnecessary bonuses, or of even cutting them off altogether.

But the significant statute in this connection is the Act of 1932, Chapter 192, amending Chapter 175, Laws of 1920, as indicated by the words in italics:

> "The privileges and powers conferred by this Act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of the powers now permitted to corporations of this State. *A resolution or by-law heretofore adopted by a majority vote of the stockholders of a corporation entitled to vote thereon shall be valid from the time of such adoption or approval to the extent it contains terms which might be embodied in a plan or plans authorized by this Act as amended.*"

It is evident on the face that this so-called curative act was introduced and passed to meet the very situation developed by this litigation. No Legislature on its own motion would go so far out of its way to pass an act of such limited application. The act, however, as remedial legislation is plainly unconstitutional. It violates both the Constitutions of New Jersey and of the United States.

The Constitution of New Jersey contains the following provision (Art. 4, Sec. 7, par. 3):

> "The legislature shall not pass any * * * law impairing the obligation of contracts, or depriving a party of a remedy for enforcing a contract which existed when the contract was made."

Similarly Section 5 of the General Corporation Act (Smith, p. 74) provides as follows:

> "This act may be amended or repealed, at the pleasure of the legislature, and every corporation created under this act shall be bound by such amendment; but such amendment or repeal shall not take

> away or impair any remedy against any such corporation or its officers for any liability which shall have been previously incurred; this act and all amendments thereof shall be part of the charter of every corporation heretofore or hereafter formed hereunder, except so far as the same are inapplicable and inappropriate to the objects of such corporation."

Commenting on this matter, it has been said in New Jersey (*Rader* v. *Southeasterly Rd. Dist.*, 36 N. J. L. 273, 280) that any legislation, the effect of which is to deprive a party of the power to resort to the person or any property, which as the law was when the contract was made might have been taken or applied in satisfaction of his demand, is within the prohibition of the Constitution prohibiting the passage of any law depriving a party of any remedy for enforcing a contract which existed when the contract was made; it being added that the very purpose of the insertion of this clause in the Constitution of 1844 was to meet the previous decisions of this Court drawing a distinction between the obligation of a contract and the remedies thereunder.

If it were possible to get by the Constitution and laws of New Jersey with this retroactive special legislation, it would be stopped by the contract clause of the Federal Constitution.

The Act of 1932, however, performs a very useful function in the determination of the question now under discussion. It plainly shows that there was no law in existence in 1912 which could have authorized By-Law XII; for why resort to legislation to validate what was already valid? The implication of original invalidity is manifest; and, as the invalidity rests upon a plain charter limitation, no subsequent legislation could cure it in any event.

In conclusion, it will be noted that this futile act speaks of a by-law adopted by a vote of stockholders "entitled to vote thereof"; and this brings us to

POINT II.

The stockholders by an express provision of the charter having delegated to the directors the power to adopt by-laws, lost all power to adopt By-Law XII.

The charter, it has been observed, expressly conferred on the directors the authority to make and alter by-laws (R. p. 30).

This provision in the charter was inserted by authority of the General Corporation Act of New Jersey (Laws of 1896, Chap. 185, Sec. 11; Smith, p. 184), which provided:

> "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in its certificate of incorporation, confer that power on the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders."

The authorities are uniform that where the charter contains such a provision the stockholders cannot enact a valid by-law.

In *Fletcher on Corporations*—the latest textbook on the subject—it is said (Sec. 4172):

> "The charter of the corporation may expressly vest such power [adoption of by-laws] in the governing board and when this is done, the by-laws, of course, must be adopted not by the stockholders or members, but by such board."

By-laws enacted by the stockholders in such case

> "are lacking in validity, or legal force and effect" (*id.*).

To the same effect is *Thompson on Corporations,* Section 1069, and *Corpus Juris,* Volume 14, page 353, Section 447.

See also, expressly in point:

Mfg. Bldg. Co. v. *Landay,* 219 Ill. 168, 174, 177;
People v. *Ittner,* 165 Ill. App. 360, 365;
Indiana ex rel. v. *Day,* 189 Ind. 243, 247;
In re Klaus, 67 Wisc. 401, 405;
Kaski v. *Kemppainen,* 110 Ore. 362, 367;
The King v. *Westwood,* 4 Barn. & Cress. 781, 788;
Dunsmuir v. *Colonist Co.,* 9 Br. Col. 290, 293;
Colonial Ass. Co. v. *Smith,* 22 Man. 441, 445;
Kelly v. *Electrical Cont. Co.,* 16 Ont. 232, 239.

In the recent case of *Scott* v. *Lorillard,* 108 N. J. Eq. 153, 155, the same conclusion was reached on a consideration of the general corporation laws of New Jersey alone. The Vice-Chancellor said:

> "The stockholders may, of course, choose directors who will act in accord with their wishes. They may limit the authority of the latter pursuant to Section 8 (VII) but they cannot usurp the powers of the Board. Lowenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219. It should be noted that the directors have not formulated or approved the proposed by-law."

The Court of Errors and Appeals thought this statement unnecessary to the decision, and expressed no opinion on it one way or the other. It did not appear, however, in the *Lorillard* case that the power to pass by-laws had been delegated by the charter to the directors, as was done in the case at bar.

No majority of stockholders could impose a profit-sharing arrangement upon the minority stockholders in any form; but least of all by passing a by-law as to which the stockholders were *functus officio.* The sole power of the corporation toward its employees in this regard was confined to paying "suitable compensation" (G. C. A., Sec. 1-V; Smith, p. 96), and this was a matter of corporate management left to the directors to be reasonably exer-

fixed, subject to the ordinary liability of trustees for an abuse of power.

The point here is by no means technical. It is the unquestioned law in New Jersey, as nearly everywhere else, that corporate management resides solely with the directors. With this duty goes a corresponding obligation to the shareholders to administer the affairs of the company with wisdom and economy. The by-law, particularly as it in terms provided that it could only be repealed by action of the stockholders, relieved the directors of this fiducial responsibility. The bonus payments became enormous; certainly the $113,000,000 of new money that the stockholders contributed subsequently to the passage of this by-law, as well as the large increases in fixed salaries, and the other special benefits referred to at pages 6 and 7 of the petition, justified, if it did not demand, the reconsideration of this by-law by the directors in the exercise of sound administration. But the by-law absolutely sought to disqualify them from the performance of this most elementary duty.

This exact point was raised in *Berendt* v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148, 149, 152, where the Court approved inferentially the charge made in that case that "though the stockholders fixed the percentage of bonus, it became the duty of the board of directors, whenever the bonus became excessive, to modify it to a basis of reasonable compensation * * * as they were in conscience bound to do."

It will be observed that the by-law provided as follows:

> "This By-Law may be modified or repealed only by action of the stockholders of the company and not by the directors."

How could the stockholders, especially in view of the express provision of the charter to the contrary, thus undertake to denude the directors of their statutory authority and rivet on the minority stockholders for all time this perpetual diversion of company profits? Most of all, how

could they fasten this burden on the common B stockholders, brought into existence in 1920 only, whose financial interest is twice as large as the common stockholders, but who possess no voting rights? (R. p. 13).

In his dissent, Swan, J., said:

> "Here the directors have exercised no discretion; they rely upon a by-law to relieve them of that duty, and the by-law, as it now operates, results in so large a payment that the trial court thought it probably invalid as applied to future earnings" (R. p. 237).

POINTS III AND IV.

Denial of the right to an equitable revision of total compensation, even if By-Law XII were valid.

These two points are here considered together. Either the Trial Court, without authority, on a mandate merely reversing an injunctive order against further payments under the by-law pending litigation, denied the petitioner a hearing upon the second branch of his case, to wit, the revision of salaries, and thus denied him due process of law; or the Appellate Court, by affirming this decree dismissing the case upon the merits, notwithstanding the uncontroverted allegations of the complaint, arrived at the same conclusion. The result in the end is the same, and however arrived at, is opposed not only to the weight of authority but practically all reported authority.

The province of equity to revise excessive salaries and fix the reasonable compensation of officers is established by a long and unquestioned line of authorities. The following cases were cited in the dissenting opinion of Swan, J. (R. p. 237):

> *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411;
> *Collins* v. *Hite*, 109 W. Va. 79;
> *Wight* v. *Heublein*, 238 Fed. 321;

Nichols v. *Olympia Veneer Co.*, 139 Wash. 305;
McKey v. *Swenson*, 232 Mich. 505;
Lowman v. *Harvey R. Pierce Co.*, 276 Pa. 382;
Scott v. *P. Lorillard Co.*, 108 N. J. Eq. 153, aff'd 109 N. J. Eq. 417;
Berendt v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148;
Stratis v. *Andreson*, 254 Mass. 536;
Ransome Concrete Machinery Co. v. *Moody*, 282 Fed. 29;
Church v. *Harnit*, 35 Fed. (2d) 499, 502;
Booth v. *Beattie*, 95 N. J. Eq. 776, aff'd 95 N. J. Eq. 776;
Putnam v. *Juvenile Shoe Corp.*, 307 Mo. 74.

To these may be added the following additional citations:

Mitchell v. *United Box Board & Paper Co.*, 72 N. J. Eq. 580, 585;
Gardner v. *Butler*, 30 N. J. Eq. 702 (Ct. Er. & Appls.);
Lillard v. *Oil Co.*, 70 N. J. Eq. 197, 204;
McMahon v. *Burdette Oil Co.*, 105 N. J. Eq. 79, 80;
Raynolds v. *Diamond Mills Co.*, 69 N. J. Eq. 299, 312;
Godley v. *Crandall*, 153 N. Y. App. Div. 697, 710;
Atwater v. *Elkhorn Co.*, 184 N. Y. App. Div. 253, 258;
Schall v. *Althaus*, 208 N. Y. App. Div. 103, 106;
Decatur Land Co. v. *Palm*, 113 Ala. 531, 537;
Backus v. *Finkelstein*, 23 Fed. (2d) 531, 537.

The latest statement approved by the Court of Errors and Appeals in New Jersey in *Booth* v. *Beattie*, 95 N. J. Eq. 776, with reference to this subject, is as follows:

> "It [i. e., the resolution fixing the salaries] is not voidable at the option of a dissenting stockholder as are similar resolutions similarly passed by a

> board of directors, but it is reviewable in equity as to the fairness and reasonableness of the salary at the instance of such stockholder. The rule is that contracts made by a board of directors with one of their number are, regardless of merits, voidable at the option of a dissatisfied stockholder, while such contracts sanctioned by a majority of the stockholders will be set aside by the court if it is disadvantageous to the minority stockholders. Equity will investigate."

Another very clear statement of the rule is in the case of *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411, 422, cited in the dissenting opinion:

> "Where a board of directors votes excessive salaries to certain of its members who are officers or employees of the corporation, even though such action may subsequently be ratified at a stockholders' meeting, the action of the board is subject to review by a court in equity, and if the finding of the latter tribunal is that the salaries in question are exorbitant, it may determine the value of the services rendered by the officers or employees in question and restrain the corporation from paying the excess thereof."

The textwriters are to the same effect:

> *Fletcher on Private Corporations*, Sec. 2779;
> *Thompson on Corporations*, Secs. 1876, 1877;
> *Spellman on Corporate Directors*, Sec. 225.

Undoubtedly the sound reason for equitable interference in the matter of excessive salaries is that stated in Judge Swan's dissent, that if there is no relation between services rendered and payment made, it really amounts to a gift, "and the majority stockholders have no power to give away corporate property against the protest of the minority." (See also *Collins* v. *Hite*, 109 W. Va., at p. 83.) The Court of Appeals in New York speaks of such excess payments as "without consideration" (*Godley* v. *Crandall*, at p. 128).

The principle of these authorities, to which practically none are opposed, was completely disregarded by the judgment below.

Bonus payments of $850,000 for one year, increased fixed salaries, special credits, and stock benefits voted by the directors running for the year 1931 in excess of $2,600,000 for the president alone, with payments to vice-presidents running from $746,000 to $1,587,000 (R. p. 19), were not sufficient, in the opinion of the majority of the Circuit Court of Appeals, to invoke this wholesome remedy. "Individual minority stockholders are not permitted to question the acts of directors * * * if they are done in good faith and in the exercise of honest judgment," say the majority of two Judges, although two other Circuit Judges are not in accord. But were these acts done in good faith and in the exercise of an honest judgment? Can a waste of corporate assets, such as the payment of exorbitant compensation to officers and directors undoubtedly is, be justified upon the ground that it is an act of good faith or sound discretion? The majority opinion says there are no charges of fraud. But fraud, if that be important, is a legal conclusion from facts properly pleaded. In *Godley* v. *Crandall*, 212 N. Y. 121, 132, where a similar contention was made, the Court replied: "But it is plain that the fraud consisted in the officers helping themselves to the funds of the corporation under the guise of salaries voted by themselves." Actual fraud, moreover, in the situation here presented, is not controlling. "If a corporation cannot lawfully do a thing, it makes no difference how honestly its officers may attempt to accomplish it" (Bigelow, V. C., in the recent case of *Meyerhoff* v. *Bankers Securities Co.*, 105 N. J. Eq. 76, 84; see also *Mayer* v. *Oxidation Products Co.*, 110 N. J. Eq. 141, 156, cited at length at page 9 of this brief).

The argument for the respondents at this point has been that the individual stockholder has no right to ask a court to substitute its judgment for that of the management in matters relating to the internal affairs of the company.

That doctrine of course has no application where there has been a diversion of corporate assets (*Mayer* v. *Oxidation Products Co.*, 110 N. J. Eq., at p. 147; *Busch* v. *Riddle*, 92 N. J. Eq. 265 [Ct. Er. & Appls.]). But if the doctrine were to be applied in its stark rigor, the status of an individual stockholder in one of the giant corporations, like The American Tobacco Company, with a seated management, would indeed be hopeless.

"The law must be stable, but it cannot stand still," is a maxim which lies at the very soul of equity; which forever must devise new remedies against new wrongs. The Courts of to-day cannot blind themselves to social or economic trends in corporate management which render their intervention more imperative than ever before, if crimes within the law are to be prevented. In their recent joint work on corporate developments, Prof. Berle of Columbia and Mr. Gardiner Means, discussing the separation of ownership from control in corporate management, thus conclude:

> "The whole effect of the growth of powers of directors and control have been steadily to diminish the number of things on which a stockholder can count; the number of demands which he can make with any assurance that they must be satisfied. The stockholder therefore is left as a matter of law with little more than the loose expectation that a group of men, under nominal duty to run the enterprise for his benefit and that of others like him, will actually observe this obligation. In almost no particular is he in a position to demand that they do or refrain from doing any given thing. As a result, we have reached a condition in which the individual interest of the stockholder is definitely made subservient to the will of a controlling group of managers even though the capital of the enterprise is made up out of the aggregated contributions of perhaps many thousand individuals." (Berle & Means, The Modern Corporation and Private Property, p. 277.)

And dealing with equitable intervention in a case wholly parallel to that at bar, the writer in a recent number of

the Harvard Law Journal, March, 1933, 46 Har. L. J., p. 833, observes:

> "Intervention [where director-executives as majority stockholders approve their own salaries] is placed on the ground that the dominant majority must be held to a strict fiduciary standard in the treatment of the minority. In a large corporation the stock of which is widely held, the situation is little different. The strategic position of a management possessing but a negligible stock interest often enables it to exercise a dominion as absolute as that of a majority stockholder. Since the stockholder's consent has become purely formal and largely fictional, there exists the same necessity for protecting outsiders by examination of the reasonableness of the insiders' remuneration."

The American Tobacco Company has 42,000 individual shareholders; the fact that to the present time the company has been successful, in itself makes reform by a change of management impossible even if it were desirable; but upon the other hand the unique structure of this organization, where the board is wholly composed of employees, and where the powers of the president are autocratic (see Sec. 7 of Art. IV and Sec. 2 of Art. V of the By-Laws, R. pp. 51, 53), peculiarly lends itself to abuse in the matter of compensation. There are therefore special reasons for judicial intervention in the case here presented; although there are also present elements of illegality and exorbitance which at any stage of the law would have justly invited judicial scrutiny.

Separate Defenses.

None of these defenses was relied upon by the Court below to support its judgment. They nevertheless will be briefly reviewed.

The first defense is that the petitioner should have combined with two other stockholders and called a meeting to repeal the by-law. The petitioner's contention is that the

by-law is invalid, and therefore does not need to be repealed. If valid, the total compensation is still subject to revision, and the principle invoked could not apply.

The second defense sets out that because the petitioner had previously criticized the management, attended the annual meeting of the company April 1, 1931, and voted against Mr. Hill together with holders of some 20,000 shares of stock, he has ratified this particular transaction involved in a suit commenced March 30, 1931. The allegation that petitioner knew that unless the defendants were re-elected their connection with the company would have been severed is a complete *non sequitur*. There was at this meeting not only no direct ratification of the acts complained of, but not even the remotest implication of any approval or acquiescence in those acts. See, as expressly in point, *Continental Securities Co.* v. *Belmont*, 206 N. Y., at p. 17.

The third defense is the law of the *forum non conveniens*, which has already been dealt with (*ante*, p. 7).

The fourth defense is *laches*. But without actual knowledge there can be no laches.

In *Endicott* v. *Marvel*, 81 N. J. Eq. 388, the following statement of the law was approved:

> "Laches is a defense only when the stockholder with a full knowledge of the facts has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense. Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence. * * * But it is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books. Moreover, it is the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay."

Paragraph 15 of the complaint (R. p. 20) alleges:

> "The plaintiff further avers that the various payments made under said by-law XII to the individual defendants herein were never disclosed to the stockholders of the said company by any official or other communication prior to February, 1931, when the plaintiff as a stockholder made an application to the Supreme Court to examine the books of the said company with respect to salaries and other benefits or payments made by said company to its officers, directors and employees, and that prior to said date he had no knowledge thereof."

Moreover, the wrong here was a continuing wrong (see *Hill* v. *Glasgow R. R. Co.*, 41 Fed. 610, 619 [Opinion by Howell E. Jackson, J.]; and *Lillard* v. *Oil Co.*, 70 N. J. Eq. 197, 211).

Compare *Pollitz* v. *Gould*, 202 N. Y. 11, 17; *Appleton* v. *Am. Smelting Co.*, 65 N. J. Eq. 375.

Federal Courts, moreover, usually apply the doctrine of *laches* in analogy to the statutes of limitations (*Kelly* v. *Boettcher*, 85 Fed. 55, 62; *Backus* v. *Nor. Pac. Ry. Co.*, 21 Fed. [2d] 4, 12), which in New York is ten years (Civ. Pr. Act, Sec. 53). See also *Pollitz* v. *Wabash Ry. Co.*, 207 N. Y. 113, 130.

The fifth separate defense sets forth the accomplishments of the directors in the administration of the company's affairs. But, in *Jacobson* v. *Brooklyn Lumber Co.*, 184 N. Y. 152, 161, dealing with a similar question, the Court of Appeals of New York said:

> "Neither the good faith, honesty, nor legality of the acts of officers of a corporation can be determined by ascertaining whether the market value of the capital stock of the corporation has increased or diminished during the time when said acts were performed. A corporation may lose money notwithstanding good, faithful honest endeavor by its officers, and it may increase its assets notwithstanding selfish and illegal acts by them."

See also *Rogers* v. *Guaranty Trust Co.*, 53 Sup. Ct. Rep., at p. 302.

Conclusion.

In conclusion it may be said that the petitioner has not deemed it necessary to discuss the economic or social side of the bonus system as such. The extensive contemporaneous literature bearing on both sides of this interesting question will be found collected in the January (1933) number of the Yale Law Journal, pages 419, 420. Neither has it seemed to him necessary to comment at length upon the cases in which the subject has been touched upon by the courts—in none of them has it really been subjected to a reasoned analysis. Petitioner will content himself with saying: as to the general question, that whatever advantages the bonus system may possess when the employees as a class are admitted to partnership in the joint enterprise, such advantages disappear when the system becomes a mere device to automatically enlarge the emoluments of a few selected positions regardless of the merits of the occupants; and, as to the cases, that in none which may be referred to, or cited by counsel, were there present the elements which are before the court in the case at bar, viz., that profit sharing was in conflict with the charter, and over and beyond that so excessive, particularly when combined with the other payments, as to constitute a gift of corporate funds.

Respectfully submitted,

RICHARD REID ROGERS,
Petitioner, *pro se.*

EVAN SHELBY,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS, *Petitioner,*

against

GEORGE W. HILL, C. F. NEILEY, V. RIGGIO AND THE AMERICAN TOBACCO COMPANY, *Respondents,*

and

A. C. MOWER AND CHARLES A. PENN (deceased), *Defendants.*

RICHARD REID ROGERS, *Petitioner,*

against

THOMAS R. TAYLOR AND THE AMERICAN TOBACCO COMPANY, *Respondents.*

Consolidated Cause.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

NATHAN L. MILLER,
WILLIAM M. PARKE,
Counsel for Respondents.

CORPORATE PRESS, INC., NEW YORK CITY

INDEX

PAGE

RELIMINARY STATEMENT 1

UMMARY OF REASONS AGAINST THE ALLOWANCE OF THE WRIT PRAYED FOR 4

RGUMENT:

I. The first mandate and decision of the Circuit Court of Appeals constituted a final determination of all the issues in the cause, and the time to apply for a writ of certiorari expired three months after June 29, 1932, the date of entry thereof 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS, *Petitioner,* against GEORGE W. HILL, C. F. NEILEY, V. RIGGIO and THE AMERICAN TOBACCO COMPANY, *Respondents,* and A. C. MOWER and CHARLES A. PENN (deceased), *Defendants.*	Consolidated Cause
RICHARD REID ROGERS, *Petitioner,* against THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY, *Respondents.*	

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement.

Petitioner, a stockholder of The American Tobacco Company, a New Jersey corporation (hereinafter called "Company") sought by this cause to obtain a decree declaring Article XII of its By-Laws invalid. That By-Law was

adopted on March 13, 1912, by practically the unanimous vote of all the stockholders present at a duly constituted meeting. No Common Stock and only 35 preferred shares voted against it (R., p. 76).

Article XII by its terms provided that it could be modified or repealed only by the action of the stockholders (R., p. 59). It provided for a 2½% participation by the President and a 1½% participation by each of five Vice Presidents in excess of the annual net earnings of the Company from certain specified sources (after paying the dividends on the preferred stock) over the amount which had been adopted as the amount of the net profits from the same sources for the year 1910 (R., pp. 23, 24).

The individual defendants became executives of the Company, entitled to compensation under the By-Law, years after it had been in operation (R., p. 13). They had no hand in its creation or adoption.

No attack was ever made upon Article XII, either in court or out of court, until March 31, 1931, when the first of these suits was instituted by petitioner (R., pp. 19, 83, 196).

Petitioner sought also to have all compensation paid to the individual defendants *under the By-Law* since, in some instances, as early as 1921, returned to the Company and, as alternative relief in the event the By-Law was held valid, to have the court fix the compensation of all present and future presidents and vice presidents beyond which no further or additional compensation could be paid (R., pp. 21-22).

The issues raised by the answer were:

1. Failure to comply with Equity Rule 27 (R., pp. 76, 77).

2. Approval by the stockholders of the payments made under the By-Law (R., pp. 78-81).

3. *Forum non conveniens* (R., pp. 81, 82).

4. Laches (R., pp. 82, 83).

5. Services of the individual defendants more valuable than any compensation paid and compensation a question of internal affairs (R., pp. 83-107).

Petitioner, after joinder of issue, made a motion in the District Court (1) to strike out each one of the five separate defenses; (2) for a decree declaring Article XII invalid, requiring the individual respondents to account for all payments made to them under that Article, and restraining the Company from making any further payments thereunder; and (3) in the alternative, for an injunction *pendente lite* restraining any further payments to any president or vice president under the By-Law (R., pp. 6-8).

The motion was heard on January 15, 1932 (R., p. 5). On March 18, 1932, the District Court rendered an opinion which stated (but gave no reasons for the conclusion) that its impression was that the By-Law was invalid; the opinion stated further that its view was only tentative because it did not have an adequate opportunity for investigation and reflection (R., pp. 5, 212).

On March 24, 1932, pursuant to that decision, an order was entered in the District Court granting petitioner's motion for an injunction upon the giving or waiver of a bond in the sum of $1,000 (R., pp. 214-216).

The respondents appealed to the Circuit Court of Appeals, which court directed a reversal of the decree of the District Court and disposed of all the issues in the case by its majority opinion which stated in part:

> "* * * The by-law is neither *ultra vires*, fraudulent nor illegal, and since it is not, courts must refuse intervention because they are powerless to grant it. Here the matter of salaries, like that of other corporation affairs, must be disposed of by the majority of stockholders and in the manner that their interests may dictate, and the action of the majority is binding upon all, whether approved or disapproved by the

> minority. * * * By-Law XII was properly passed and became a valid governing act of the corporation" (R., p. 233).

On June 29, 1932, the Circuit Court issued its mandate which reversed the order of the District Court and directed "that such further proceedings be had in said cause in accordance with the decision of this court * * *" (R., p. 241).

On July 8, 1932, the District Court, per MACK, *C. J.*, entered a decree based upon the mandate and decision of the Circuit Court of Appeals dismissing each of the bills of complaint upon the merits (R., pp. 242-243).

Instead of applying for a writ of certiorari, petitioner appealed to the Circuit Court of Appeals from the decree of the District Court entered upon the mandate and decision of the Circuit Court of Appeals (R., pp. 244-245), and the errors assigned on that appeal were:

> "1. The Court erred in dismissing the bills of complaint upon the merits.
>
> 2. The Court erred in failing to render judgment for the plaintiff [petitioner] for the relief prayed for in the amended complaint.
>
> 3. The Court erred in dismissing the bills of complaint solely upon the mandate and decision of the Circuit Court of Appeals" (R., p. 246).

On such second appeal, the Circuit Court of Appeals affirmed the decree of the District Court as having been correctly entered in conformity with its mandate and decision on the first appeal (R., p. 253).

Summary of Reasons Against the Allowance of the Writ Prayed For.

I. The first mandate and decision of the Circuit Court of Appeals constituted a final determination of all the issues

in the cause, and the time to apply for a writ of certiorari expired three months after June 29, 1932, the date of entry thereof.

II. The application for a writ of certiorari from the second mandate and decision of the Circuit Court of Appeals presents no reviewable question.

III. No special or important reasons are shown for the exercise by this court of its discretionary powers of review.

IV. The decision of the Circuit Court of Appeals on the first appeal sustaining the validity of the By-Law, which the petitioner did not seek to review, is in harmony, not in conflict, with the applicable New Jersey decisions.

A. The question presented by petitioner's reason 1 has been decided adversely to his contention by the highest court of New Jersey.

B. The question presented by petitioner's reason 2 has been decided adversely to his contention by the highest court of New Jersey.

V. Reasons 3 and 4 assigned by the petitioner involve familiar questions of corporate management which this court has repeatedly declined to review.

I.

The first mandate and decision of the Circuit Court of Appeals constituted a final determination of all the issues in the cause, and the time to apply for a writ of certiorari expired three months after June 29, 1932, the date of entry thereof.

By its mandate and decision, on the first appeal, the Circuit Court of Appeals disposed of every issue in the case.

The majority opinion of the Circuit Court of Appeals, after holding (R., p. 233) that Article XII "was properly passed and became a valid, governing act of the corporation." said (R., p. 234):

> "* * * That the president and five vice-presidents each received unusually large salaries as a result does not justify a court of equity in attempting to substitute its judgment for the judgment of the stockholders whose affair it is in the absence of any claim of fraud. In any case, we think that the by-law was lawfully passed and that it was valid, effective and controlling in the allotment of additional compensation to officers of the corporation."

The instruction to the District Court contained in the mandate of the Circuit Court of Appeals, "that such further proceedings be had in such cause in accordance with the decision of this court," was therefore a final mandate of the Circuit Court of Appeals directing the District Court to render judgment dismissing the complaints upon the merits. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136.

No evidence could have been taken by the District Court or considered, no change in the issue was possible, nothing remained for the District Court, but the ministerial duty of entering the decree dismissing the complaints upon the merits. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136; *McGourkey* v. *Toledo*, 146 U. S. 536; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

The petitioner himself asserts in the assignment of errors that the decree of the District Court of July 8, 1932 was entered "solely upon the mandate and decision of the Circuit Court of Appeals" (R., p. 246).

The decree of July 8, 1932, of the District Court shows on its face (R., pp. 242-3) that that Court consulted and obeyed the mandate and decision of the Circuit Court of Ap-

peals and entered its decree dismissing the complaint on the merits in accordance therewith. In so doing, the District Court was correct. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136; *Farmers' National Bank* v. *Wilkinson*, 266 U. S. 503; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399; *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551; *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255; *Roberts* v. *Cooper*, 20 How. 467.

The decision and mandate of the Circuit Court of Appeals thus being final, petitioner should have applied for a writ of certiorari to this Court within three months from the issuance of its mandate, to wit, three months from June 29, 1932. *Morton* v. *United States*, No. 638, October Term, 1932; *Dubilier Condenser Corporation* v. *Radio Corporation of America*, No. 396, October Term, 1932; *Gotham Can Co.* v. *United States*, 281 U. S. 706; *Hooper* v. *United States*, 274 U. S. 743; *Rust Land & Lumber Co.* v. *Jackson*, 250 U. S. 71, 76. This he did not choose to do, but appealed again to the Circuit Court of Appeals.

Petitioner erroneously says in his brief that "the first decision," that is, of the Circuit Court of Appeals, "merely reversed an interlocutory order and dissolved an injunction *pendente lite*, a discretionary matter" (Petitioner's Brief, p. 4). In truth, the first decision was on the merits, wherefore Judge AUGUSTUS N. HAND was constrained by it on the second appeal.

This contention that the decree of the Circuit Court of Appeals entered on the first appeal did not permit of an application for a writ of certiorari because it involved a matter of discretion is refuted by (1) the opinions of the Circuit Court of Appeals on both appeals and (2) the history of the cause.

If the first appeal involved a discretionary matter, the injunction *pendente lite* would not have been disturbed on

appeal. *Goldwyn Pictures Corp.* v. *Goldwyn*, 296 Fed. 391 (C. C. A. 2d); *Maison Dorin Societe Anonyme* v. *Arnold*, 296 Fed. 387 (C. C. A. 2d).

If petitioner had any doubt concerning the finality of the first decree of the Circuit Court of Appeals, that doubt should not be permitted to extend his right of review of that decree beyond the three months' period provided by the statute. Act of February 13, 1925, c. 229, Sect. 8(a), 43 Stat. 936, 940 (U. S. C., Title 28, Section 350). But he could have had no doubt whatever of the finality of the decree of the District Court dismissing the complaint on the merits and he knew, at the time of its entry, that that decree was based solely on the mandate and decision of the Circuit Court of Appeals.

II.

The application for a writ of certiorari from the second decree of the Circuit Court of Appeals presents no reviewable question.

The only question that could actually be presented to the Circuit Court of Appeals by that appeal was whether the decree of the District Court was in conformity with the mandate and opinion of the Circuit Court of Appeals on the first appeal. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 398, 418.

The errors assigned by petitioner (R., p. 246) attempted to bring up for consideration in the Circuit Court of Appeals the merits of the controversy which had already been decided by it. He did not assign as error that the decree of the District Court was not in conformity with the mandate and decision of the Circuit Court of Appeals but, on the contrary, assigned as error that the District Court erred in dismissing the bills of complaint solely upon the mandate and decision of the Circuit Court of Appeals.

Thus the appeal taken by petitioner, as disclosed by the assignment of errors, was an attempt to appeal from the Circuit Court of Appeals to itself. *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 37; *Texas Pacific Railway Co.* v. *Anderson,* 149 U. S. 237, 242; *Mackall* v. *Richards,* 116 U. S. 45, 56; *Humphrey* v. *Baker,* 103 U. S. 736; *Stewart* v. *Salamon,* 97 U. S. 361.

The Circuit Court of Appeals affirmed, thus determining that the decree of the District Court was in conformity with its mandate and opinion on the previous appeal.

It is evident that no ground appears upon which this Court should review the mandate and decision of the Circuit Court of Appeals entered upon the second appeal.

III.

No special or important reasons are shown for the exercise by this Court of its discretionary powers of review.

The validity of By-Law XII is a question of New Jersey law decided by the Circuit Court of Appeals in harmony with the New Jersey decisions, as is shown under the next point.

The alternative prayer for relief that, in the event that the By-Law be adjudged valid, the Court "fix the fair and reasonable compensation" of the officers of the Company (R., p. 21), presents the familiar question of internal corporate management.

Acting fairly, in the interests of all, the stockholders have the right to decide whether their By-Law shall be continued, revised or repealed; indeed they expressly reserved that right to themselves in the By-Law itself (R., p. 25). It is for them to measure its results and to determine whether the benefits to the entire body of stockholders justify its con-

tinuance. It is for the stockholders to determine the reasons for the Company's success, resulting in large profits to themselves and in correspondingly large contingent compensation to the officers. If they believe the relation of cause and effect exists between their profits and such contingent compensation, it is for them to decide whether they want to hazard a continuance of their own profits on a change of policy.

There is not a single suggestion in the bill of complaint of oppression of a minority by a majority interest or of any element of fraud, either actual or constructive.

The complaint does not allege even that the payments under the By-Law are by themselves excessive, but only that they become excessive when added to other payments (R., p. 20).

But this case involves only the payments made under the corporate law, adopted by almost a unanimous vote of stockholders, and constituting a part of the contract of employment.

If other payments or stock allotments have been wrongful, the remedy is a proper suit or suits to redress those wrongs and the petitioner says in his bill, and this Court knows, that he is pursuing those remedies (R., pp. 14, 15).

IV.

The decision of the Circuit Court of Appeals on the first appeal, sustaining the validity of the By-law, which the petitioner did not seek to review, is in harmony, not in conflict, with the applicable New Jersey decisions.

A. *The question presented by petitioner's reason 1 has been decided adversely to his contention by the highest court of New Jersey.*

The question as to whether compensation to executives of a New Jersey corporation can be based upon a contingent share of its profits is a matter of local law which has been decided by the highest court of New Jersey in *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320, and thereafter reaffirmed by subsequent decisions by the courts of that State.

The Company was organized in 1904. Article XII was adopted in 1912. It provided expressly that the amount to be paid to the six chief executive officers under the provisions thereof was to be paid "as salary for the year, in addition to the fixed salary of each of said officers."

By Article II of the Charter of the Company the latter was given the powers conferred by Section 1 of the New Jersey Act Concerning Corporations (Revision of 1896) (R., p. 28).

Section 1 of the General Corporation Act of New Jersey provides, among other things:

> "Every corporation shall have power:
>
> * * * * * * * *
>
> V. To appoint such officers and agents as the business of the corporation shall require, and to allow them suitable compensation."

The participation in the share of the profits authorized by Article XII of the By-Laws was expressly designated as additional salary, was allowed by the stockholders, and comes within the express powers delegated to the Company by the General Corporation Act of New Jersey.

The compensation to officers, as to any other agent, is an operating expenditure of the Company. It makes no difference whether the compensation is in the form of a fixed salary or based upon the profits of the Company. Until the expenditures have been met, there are no net profits of the Company.

The precise question here presented has already been decided by the Court of Errors and Appeals of New Jersey in *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320 (1902).

There, plaintiff, employed to construct a glass works for the defendant, and, after its construction, to manage its operations, was to be paid a fixed compensation and one-sixth of the net profits of the company's business. He brought suit for the one-sixth and defendant there relied upon § 47 of the General Corporation Act of New Jersey (L. 1901, Ch. 110, § 2), which provides that:

> "Unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation * * * shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amounts so reserved, and pay the same to such stockholders on demand."

This contention of defendant, which is the same contention as petitioner raises here, was swept aside by the Court, which said (p. 323):

> "* * * But this one-sixth proposed to be given to the plaintiff was salary—payment for services—and not part of the profits, but part of the expenses of the business, and if the corporation had permitted its president, by acquiescence or by receiving the benefit of the services for which this one-sixth was to pay, to make this arrangement, then the corporation was as much bound to pay this as to pay the fixed salary which they had agreed to. The profits referred to in Section 47 were not ascertained until this expense of conducting the business had been paid."

The right to pay compensation by way of participation in the net profits was recognized and reaffirmed subsequently in New Jersey by the following cases: *Smith* v. *Bedell Bros.*, 84 N. J. Eq. 268, affd. 84 N. J. Eq. 509; *Booth* v. *Beattie*, 95 N. J. Eq. 776, affd. 95 N. J. Eq. 776; *Costello* v. *Thomas Cusack Co.*, 96 N. J. Eq. 95.

The right to pay the agents of a corporation by a participation in the net profits has been recognized by all courts to which the question has been presented. *Harker* v. *Ralston Purina Co.*, 45 Fed. (2d) 929, certiorari denied, 284 U. S. 619; *Church* v. *Harnit*, 35 Fed. (2d) 499, certiorari denied, 281 U. S. 732; *Young* v. *U. S. Mortgage & Trust Co.*, 214 N. Y. 279; *Neff* v. *Gas & Electric Shop*, 232 Ky. 66; *Zwolanek* v. *Baker Mfg. Co.*, 150 Wisc. 517; *Putnam* v. *Juvenile Shoe Corp.*, 307 Mo. 74; *Ransome Concrete Machinery Co.* v. *Moody*, 282 Fed. 29; *Matter of Rosenberg*, 213 N. Y. App. Div. 167, 169.

B. *The question presented by petitioner's reason 2 has been decided adversely to his contention by the highest court of New Jersey.*

Because the Charter of the Company provides that, "the power to make and alter by-laws of said merged corporation is conferred upon the directors," petitioner asserts that the stockholders of the Company had no power to adopt Article XII.

That contention is conclusively answered by Section 11 of the General Corporation Act of New Jersey (Revision 1896, L. 1896, Ch. 185, § 11), which provides:

> "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by stockholders."

As stated in *In re Griffing Iron Co.*, 63 N. J. L. 168; affd. on opinion below, 63 N. J. L. 357 (p. 171):

> "* * * That the stockholders had delegated to the directors power to amend the by-laws did not curtail their own power to amend them, and of course the later statute (revision of 1896) removed all possible restriction on such power."

The right to alter and amend the by-laws includes the power to add as well as to change or eliminate. In *In re Griffing Iron Co.*, 63 N. J. L. 168, the Court said (p. 172):

> "* * * Our statute authorizes action by the stockholders under by-laws subject to alteration. Special meetings of the stockholders may be held under the by-laws, or, in case of necessity, under the statute. Sections 1, 2, 17, 46."

The power to amend the Constitution of the United States includes the power to make additions thereto, such as the Eighteenth Amendment. *Rhode Island* v. *Palmer*, 253 U. S. 350; *Christian Feigenspan, Inc.* v. *Bodine*, 264 Fed. 186, 190, affd. 253 U. S. 350.

In *Scott* v. *P. Lorillard Co.*, 108 N. J. Eq. 153, 155; affd. 109 N. J. Eq. 417, cited by petitioner, the Court held expressly that the authority to fix compensation for the directors of a corporation lay with the stockholders. In *Lillard* v. *Oil, Paint and Drug Co.*, 70 N. J. Eq. 197, 206 the Court pointed out that if the stockholders had no such power, the corporation might not be able to employ any director as an agent against the objection of any stockholder.

No New Jersey case is cited justifying petitioner's position. The cases cited by him from jurisdictions other than New Jersey rest upon specific statutes and are, as pointed out by the very authors cited by petitioner, an exception to the general rule that the power to make by-laws vests exclusively in stockholders.

So far as the B stockholders are concerned, they became such by virtue of the fact that they were originally holders of Common Stock of the Company, and as such are bound by Article XII. *Baumohl* v. *Goldstein,* 95 N. J. Eq. 597; *Kavanaugh* v. *Commonwealth Trust Co.,* 223 N. Y. 103, 107; *Richardson* v. *Devine,* 193 Mass. 336.

Moreover, the action of the stockholders on March 13, 1912 would be valid as a resolution fixing the compensation of the Company's officers, binding upon the Company, irrespective of whether it be called a by-law.

V.

Reasons 3 and 4 assigned by the petitioner involve familiar questions of corporate management which this Court has repeatedly declined to review.

Harker v. *Ralston Purina Co.,* 45 Fed. (2d) 929, *certiorari* denied, 284 U. S. 619;
Church v. *Harnit,* 35 Fed. (2d) 499, *certiorari* denied, 281 U. S. 732.

Petitioner points to no case and there is none, which holds that the stockholders of a New Jersey corporation have not the right to fix the compensation of its agents who are directors. Indeed, as already shown, the cases are to the contrary.

When the By-Law was passed, the stockholders had in mind that the greater the profits of the Company the greater the compensation to the officers. This additional salary was purely and wholly contingent. That there were these profits was due to the efficiency of the Company's executives. The question, therefore, whether the officers have been too successful and their compensation under the By-Law too great is for the stockholders, who have been benefited, and not for

a court, to determine. The By-Law itself so provides, as it states that this By-Law can only be repealed or amended by the stockholders.

Petitioner, in *Rogers* v. *Guaranty Trust Co., et al.*, 53 Sup. Ct. 295, asserted that the directors had no right to fix their own compensation, and in this cause he asserts that the stockholders had no right to fix the compensation of the directors who were employes. *If the directors cannot fix their compensation as officers, with the approval of the stockholders, and the stockholders cannot fix such compensation, then who has the power?*

The petitioner's statements in his brief, in respect of other payments and stock allotments, the subject of other suits (R., pp. 14, 15), merely serve to confuse the issues of this case, which concern only the validity of the By-Law and the payments thereunder. The validity of such payments are not affected by other payments, which may or may not be valid, but whose validity is the subject of other suits and is not even challenged in this suit.

Petitioner has adopted the device of bringing three separate causes each affecting a different element of compensation, to wit:

> (1) The validity of the Stock Plan. (*Rogers* v. *Guaranty Trust Co., et al.*, 53 Sup. Ct. 295; now the subject of a suit in the State Court of New Jersey.)
>
> (2) The validity of compensation under the By-Law. (This cause.)
>
> (3) The payments made for compensation through stock plans in prior years. (Subject of suit in New York State Court.)

Petitioner, without directly charging, intimates that the complaint proceeds upon the theory of fraud. He makes no such charge in his bill of complaint, and in both of the lower courts he disclaimed that he was proceeding upon fraud and

asserted that his attack upon the By-Law was based entirely on the claim of illegality, as indeed it is.

So far as the cases relied upon by petitioner are concerned, they stand for the proposition that where the majority stockholders have acted, a minority stockholder has no cause for complaint (*Church* v. *Harnit,* 35 Fed. [2d] 499, certiorari denied, 281 U. S. 732; *Ransome Concrete Machinery Co.* v. *Moody,* 282 Fed. 29; *Putnam* v. *Juvenile Shoe Corp.,* 307 Mo. 74), or they involve situations where:

(1) the stockholders were receiving no returns from the corporation; *Raynolds* v. *Diamond Mills Co.,* 69 N. J. Eq. 299, 312; *McMahon* v. *Burdette,* 106 N. J. Eq. 79, 80;

(2) the directors voted compensation to themselves after the services were completed; *Schall* v. *Althaus,* 208 N. Y. App. Div. 103, 106;

(3) the stockholders had no voice in fixing the compensation; *Mitchell* v. *United Box Board & Paper Co.,* 72 N. J. Eq. 580, 585; *Gardner* v. *Butler,* 30 N. J. Eq. 702; *Stratis* v. *Andreson,* 254 Mass. 536; *Nichols* v. *Olympia Veneer Co.,* 139 Wash. 305; *Sotter* v. *Coatesville Boiler Works,* 257 Pa. 411; *Collins* v. *Hite,* 109 W. Va. 79; *Lowman* v. *Harvey R. Pierce Co.,* 276 Pa. 382;

(4) the compensation voted was in the nature of dividends to the exclusion of other stockholders; *Godley* v. *Crandall,* 153 N. Y. App. Div. 697, 710; *Scott* v. *P. Lorillard Co.,* 108 N. J. Eq. 153, aff'd 109 N. J. Eq. 417;

(5) the directors were the majority stockholders; *Lillard* v. *Oil Co.,* 70 N. J. Eq. 197, 204; *Wight* v. *Heublein,* 238 Fed. 321; *Atwater* v. *Elkhorn Co.,* 184 N. Y. App. Div. 253, 258; *McKey* v. *Swenson,* 232 Mich. 505; *Decatur Land Co.* v. *Palm,* 113 Ala. 531, 537; *Backus* v. *Finkelstein,* 23 Fed. (2d) 531, 537.

Not one of the controlling reasons for the decision in any of the foregoing cases exists in this case. In none of the cases relied upon by petitioner was there a contract, between the corporation and the officer, authorized in the first instance by the stockholders as to the rate and amount of the compensation.

Conclusion.

The reasons advanced by petitioner for the granting of a writ of certiorari present no issue as to which this Court should exercise its discretionary power of review. The facts set forth are wholly individual and unique. No question of Federal jurisdiction or of general interest is presented, nor is there any conflict of decisions to be resolved.

The petition should be denied.

Respectfully submitted,

NATHAN L. MILLER,
WILLIAM M. PARKE,
Counsel for Respondents.

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MAY 4

Supreme Court of the United States

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS,
Petitioner,
against
GEORGE W. HILL, C. F. NEILEY, V. RIGGIO AND THE AMERICAN TOBACCO COMPANY,
Respondents,
and
A. C. MOWER AND CHARLES A. PENN (deceased),
Defendants.

RICHARD REID ROGERS,
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against
THOMAS R. TAYLOR AND THE AMERICAN TOBACCO COMPANY,
Respondents.

Consolidated Cause.

BRIEF ON BEHALF OF RESPONDENTS

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CORPORATE PRESS, INC., NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 732

RICHARD REID ROGERS,
Petitioner,
against
GEORGE W. HILL, C. F. NEILEY, V. RIGGIO and THE AMERICAN TOBACCO COMPANY,
Respondents,
and
A. C. MOWER and CHARLES A. PENN (deceased),
Defendants.

CONSOLIDATED CAUSE

RICHARD REID ROGERS,
Petitioner,
against
THOMAS R. TAYLOR and THE AMERICAN TOBACCO COMPANY,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS

Preliminary Statement.

Plaintiff,* who became a stockholder of The American Tobacco Company, a New Jersey Corporation (hereinafter called the "Company") in 1917 and who owns 200 shares of its Common Stock and 400 shares of its Common Stock B,

* We shall designate petitioner as plaintiff and the individual respondents as defendants.

attacks the validity of a By-Law known as Article XII adopted by the Company's stockholders on March 13, 1912 (R., p. 49).

Plaintiff seeks to have Article XII declared invalid and also to have all compensation paid to the individual defendants thereunder—in some instances from as early as 1921—repaid to the Company (R., p. 13) and the Company enjoined from thereafter paying to the defendants or their successors in office "any consideration in whatsoever form" over a sum to be fixed by the Court (R., p. 13).

Origin of Article XII.

Pursuant to the mandate of this Court, in *United States* v. *American Tobacco Company*, 221 U. S. 106, the United States District Court for the Southern District of New York, on November 15, 1911, entered a decree providing for the practical disintegration of The American Tobacco Company as then constituted.

The division of its domestic business, assets and plants and the allocation of important brands of cigarettes, cigars, smoking tobacco, etc., was then made among four companies, to wit, the defendant Company, Liggett & Myers Tobacco Company (a newly formed company), P. Lorillard Company (a newly formed company), and the R. J. Reynolds Tobacco Company (R., p. 54). The latter, the present manufacturer of Camel cigarettes, had not been engaged prior to 1912 in the cigarette business (R., p. 55). Decree of dissolution, *United States* v. *American Tobacco Company*, 191 Fed. 371.

Thus the Company was greatly reduced in importance in the tobacco industry and was also forced into immediate competition with corporations equally as strong in financial position, physical assets and prestige (R., pp. 54-55).

To insure to the Company the maintenance of the percentage of the business allocated to it under the dissolution

decree, the Company's stockholders recognized quickly the need of devising a method to encourage its executive personnel to use their greatest efforts. For the purpose of creating such an incentive, they adopted Article XII.

It was authorized by the practically unanimous vote of all stockholders present at the meeting at which it was adopted; only 35 shares of Preferred Stock and no Common Stock voted against it (R., p. 49).

Article XII* provides for payment, as salary additional to their fixed salaries (R., p. 14), to the President of 2½%, and to each of the five Vice-Presidents of 1½%, of a sum measured by the net earnings in excess of $11,369,000** made by the Company in its business as a manufacturer and seller of tobacco and its products (excluding the profits from certain subsidiary branches) after deducting all expenses and losses and after making such provisions for depreciation and all outstanding trade obligations as shall be determined by the board of directors (R., p. 15).

Thus the profits from such an important subsidiary as the American Cigar Company are, under the terms of that By-Law, excluded in computing this compensation (R., p. 89).

All of the individual defendants assumed their present offices many years after the adoption of Article XII (R., p. 8). It was a part of their contract of employment (R., p. 53). They rendered their services in reliance upon its terms (R., p. 53). They had no hand in its creation or adoption. They are not now and never have been majority stockholders in control of the Company (R., p. 50).

---

* Article XII is set forth in full in Appendix A, *infra*, pp. 58-59.

** Plaintiff's statement in his brief (p. 1) that the base is $8,222,245.82 is contrary to the fact. The By-Law, by § 3, provides that the 6% dividends on $52,459,400 of the Preferred Stock shall be deducted from the earnings before the net profits can be ascertained (R., p. 15). This latter amount added to the $8,222,245.82 makes the total base $11,369,000.

Results Achieved Under Article XII.

In no industry is competition more keen than in the cigarette business. The competitors of the Company are alert, ingenious and powerful (R., p. 67). The process of manufacturing, packing, selling and delivering daily more than 150,000,000 cigarettes is a task requiring a stupendous organization of human effort and constant vigilance, so as to maintain the standard of the product at its high degree of excellence (R., p. 66).

Upon this vast daily turnover the Company makes but a fraction of a cent per article. A hundredth of a cent variation in cost may make the difference in a loss or profit upon each item (R., p. 66), with the consequence that this slight variation can change an annual profit into a deficit.

In 1920 the Common Stock B was authorized by an amendment to the charter, and every common stockholder received a 75% stock dividend in the form of that newly authorized stock (R., p. 21). Both Common and Common Stock B then had a par value of $100 per share (R., p. 21). They have since been divided from time to time, so that the Common Stock and Common Stock B now have a par value of $25 per share.

As a result of such divisions and stock dividends, each stockholder of the Company owning stock in 1917 (providing he did not dispose of any of his stock) had by 1930, seven shares of Common and Common Stock B of the par value of $25 each instead of one share of Common Stock of the par value of $100 (R., p. 21). For each share of stock of $100 par value owned in 1917, each such stockholder, including plaintiff, was in 1931 receiving $42 in annual cash dividends.

The cash dividends paid to the Preferred, Common, and Common B stockholders between 1915 and 1923 exceeded $125,000,000 (R., p. 84-A). The cash dividends paid to all stockholders from 1924 to 1930, inclusive, were $147,000,000

(R., p. 84). In 1931 the cash dividends paid on all classes of stock were over $31,000,000 (R., p. 57).

Accordingly the grand total of the cash dividends paid by the Company from 1915 to 1931 exceeded $300,000,000 (R., pp. 84-84A).

The net earnings of the Company—after payment of taxes which in some years were as high as $150,000,000—for that period reached the stupendous sum of $356,000,000 (R., pp. 84-86A). This prosperity of the Company was not caused merely by any general condition in the tobacco industry, because the Company's sales were increasing while those of its competitors were decreasing.

Thus in 1930 the total increase over 1929 in cigarettes of all kinds sold in this country was approximately 500,000,000 whereas the increase in the sale of Lucky Strike cigarettes (the Company's product) was over 6,000,000,000* (R., p. 67).

Therefore, the Company's increase was, at the expense of its competitors, to the extent of 5,500,000,000 cigarettes. In the first ten months of 1931 the Company's sales of Lucky Strike cigarettes in the United States increased by 2,395,000,000 over the corresponding period of 1930, whereas the sales of its competitors' cigarettes decreased in that period by 4,479,000,000 (R., pp. 67-68).

The stockholders of the Company certainly have the right to believe that the remarkable success of the Company and the extraordinary return which they have received and are continuing to receive on their investment have justified their judgment in adopting Article XII.

---

* The Company sold approximately 37,000,000,000 of its Lucky Strike cigarettes in the United States in 1929, 43,000,212,000 in 1930 (R., p. 65), and a greater number in 1931 (R., p. 68). It sold in excess of 700,000,000 of its Cremo Cigars in 1930 (R., p. 65).

The Theory of the Complaint.

The complaint alleges and plaintiff contends here, that Article XII is illegal, *ultra vires,* and void for the following reasons:

(1) By the Charter of the Company (Exh. C, annexed to Complt.), the Directors are empowered to apply surplus or net profits only to the acquisition of property or to the payment of dividends, and are not authorized to divert a portion of the profits to officers by way of profit participation (R., p. 10);

(2) Profit participation by officers and employes of a New Jersey corporation was not legal prior to the passage of Chapter 175 of the Public Laws of 1920, subsection (b) of Section 1 (R., pp. 10-11);

(3) By the Charter, the power to make and alter By-Laws was conferred on the Directors, and the stockholders had no power to adopt Article XII (R., p. 11).

The complaint does not charge fraud, actual, constructive or otherwise. Indeed, plaintiff disclaimed in the court below that he was proceeding upon fraud, but asserted that his attack on the By-Law was based entirely upon a claim of illegality. Plaintiff, in this Court, for the first time intimates that fraud can be inferred from the allegations of the complaint. He fails to point out any allegation that supports such a suggestion. Indeed, there is none.

The Answer.

The answer consists of a general denial and five separate defenses (R., pp. 42-72). Those defenses are:

(1) Plaintiff has failed to comply with the provisions of Federal Equity Rule 27 (R., pp. 49-50).

(2) The stockholders of the Company, including plaintiff, have ratified the payments made to the de-

fendants in accordance with and under the authority of Article XII (R., pp. 50-52).

(3) The action is an attempt to interfere with the internal management of a foreign corporation engaged in a nation-wide business, the affairs of which are dependent upon the statutes of New Jersey, in respect to many of which there are no decisions of New Jersey courts to serve as a guide in their proper construction and possible interrelation (R., pp. 52-53).

(4) Plaintiff is barred by laches and estopped from maintaining the action. Article XII has been in existence for nineteen years, openly a part of its By-Laws (R., pp. 14-16); the Company and its officers relied upon it in making contracts for their compensation, said officers rendered their services upon the expectation, understanding and agreement that they would be paid in accordance with Article XII, and no stockholder other than plaintiff, and plaintiff not until March 1931, has ever objected to, or taken any action within or without the Company relative to, its validity or the payments made thereunder (R., p. 53).

(5) The amount of compensation paid to the individual defendants was and is fair and reasonable for the services they have rendered to the Company, said compensation was duly earned, under the By-Laws of the Company the Directors had the right to fix the compensation of its agents, and the payments were made in accordance therewith as well as with the authority conferred by Article XII (R., pp. 54-69).

Petitioner, after joinder of issue, made a motion in the District Court (1) to strike out each of the five separate defenses; (2) for a decree declaring Article XII invalid, requiring the individual defendants to account for all payments made to them under that Article, and restraining the Company from making any further payments thereunder;

and (3) in the alternative, for an injunction *pendente lite* restraining any further payments to any president or vice-president under the By-Law (R., pp. 4-5).

The motion was heard on January 15, 1932 (R., p. 3). On March 18, 1932, the District Court rendered an opinion which stated (but gave no reasons for the conclusion) that it was "bound to exercise jurisdiction" and that its impression was that the By-Law was invalid; the Court stated further that its view was only tentative because it did not have an adequate opportunity for investigation and reflection (R., pp. 3, 130).

On March 24, 1932, the District Court (CAFFEY, *J.*), entered its order granting petitioner's motion for an injunction upon the giving or waiver of a bond of $1,000 (R., pp. 131-133).

The defendants appealed to the Circuit Court of Appeals, which reversed the decree of the District Court and disposed of all the issues in the case by its majority opinion which stated in part:

> "* * * The by-law is neither *ultra vires,* fraudulent nor illegal, and since it is not, courts must refuse intervention because they are powerless to grant it. Here the matter of salaries, like that of other corporation affairs, must be disposed of by the majority of stockholders and in the manner that their interests may dictate, and the action of the majority is binding upon all, whether approved or disapproved by the minority. * * * By-Law XII was properly passed and became a valid governing act of the corporation" (R., p. 144).

On June 29, 1932, the Circuit Court of Appeals issued its mandate which reversed the order of the District Court and directed "that such further proceedings be had in said cause in accordance with the *decision** of this Court * * *" (R., p. 150).

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* Italics ours unless otherwise indicated.

On July 8, 1932, the District Court (MACK, *C. J.*), entered a decree based upon the mandate and decision of the Circuit Court of Appeals dismissing each of the bills of complaint upon the merits (R., pp. 150-151). Plaintiff states in his brief (p. 3) that "upon the mandate alone, without any further hearing, the District Court (MACK, *J.*) dismissed the entire case upon the merits." Actually the decree signed by Judge MACK distinguishes carefully between the mandate of the Circuit Court of Appeals and its decision, as the decree, after reciting that a mandate has duly issued from the Circuit Court of Appeals to the District Court reversing the decree of the District Court, recites: "* * * it appearing from the *decision* of the said Circuit Court of Appeals that the said cause was adjudicated by said Circuit Court of Appeals in favor of the said defendants on the merits, * * *" (R., p. 151).

Plaintiff appealed to the Circuit Court of Appeals from that decree of the District Court, instead of applying to this Court for a writ of certiorari to review the first decree of the Circuit Court of Appeals (R., p. 152).

On the second appeal, the Circuit Court of Appeals affirmed the decree of the District Court as in conformity with its mandate and decision on the first appeal (R., pp. 156-157).

Plaintiff, then, on February 25, 1933, filed his petition to this Court for a writ of certiorari "to review the decree entered in the United States Circuit Court of Appeals for the Second Circuit on the 14th day of February, 1933" (the decree on the second appeal).

Summary of Argument.

I. The Scope of the Review.

No question was raised by plaintiff's appeal to the Circuit Court of Appeals from the decree of the District Court entered July 8, 1932, other than whether that decree complied with the mandate and decision of the Circuit Court of Appeals of June 29, 1932. The decree of the Circuit Court of Appeals on plaintiff's appeal, to review which the present writ of certiorari has been granted, presents the single question whether the Circuit Court of Appeals correctly interpreted its previous mandate and decision.

II. The action involves an interference with the internal management of a New Jersey corporation, and as a necessary feature thereof, the construction and interrelation of many New Jersey Statutes, as to which the courts of the corporate domicile afford the proper forum.

III. Plaintiff has failed to comply with Equity Rule 27.

IV. Article XII is legal, *intra vires*, and valid.

(1) There is nothing in the charter that prohibits the payment to the officers or other employes of the Company of compensation measured by its profits.

(2) Under the General Corporation Act of New Jersey (revision of 1896), the stockholders have always had the power to pay officers contingent additional salary measured by the net profits of the corporation.

A. Article XII, duly adopted by the shareholders, created a contract with the officers which is unassailable as to all compensation earned.

B. The complaint does not charge any fraud.

C. Cases cited by plaintiff have no application.

(3) The stockholders of a New Jersey corporation have complete power over its by-laws.

V. Other payments or benefits under later plans which are the subjects of other suits are wholly irrelevant in this suit.

VI. The Court will not substitute its judgment for that of the stockholders and no facts are pleaded justifying interference with the internal management of the Company.

VII. Laches.

VIII. Conclusion.

I.

The Scope of the Review.

No question was raised by plaintiff's appeal to the Circuit Court of Appeals from the decree of the District Court entered July 8, 1932, other than whether that decree complied with the mandate and decision of the Circuit Court of Appeals of June 29, 1932. The decree of the Circuit Court of Appeals on plaintiff's appeal, to review which the present writ of certiorari has been granted, presents the single question whether the Circuit Court of Appeals correctly interpreted its previous mandate and decision.

The majority opinion of the Circuit Court of Appeals on the first appeal held that Article XII "was properly passed and became a valid governing act of the corporation" and that "it was valid, effective and controlling in the allotment of additional compensation to officers of the corporation" (R., pp. 144, 145). That ruling determined in favor of the defendants all the issues presented by the complaint.

Accordingly, the instruction to the District Court contained in the mandate of the Circuit Court of Appeals, "that such further proceedings be had in said cause in accordance with the decision of this Court" (R., p. 150) required the

mandate to be read together with its opinion, and was a final decree of that Court directing the District Court to render judgment dismissing the complaints upon the merits. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136. Nothing remained for the District Court, but the ministerial duty of entering a decree to that effect. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136; *McGourkey* v. *Toledo & Ohio Railway,* 146 U. S. 536; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3.

The decree of July 8, 1932, of the District Court (MACK, *C. J.*) shows on its face (R., pp. 150-151) that that Court consulted and obeyed the mandate and decision of the Circuit Court of Appeals and entered its decree dismissing the complaint on the merits in accordance therewith. In so doing, the District Court acted correctly. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136; *Farmers National Bank* v. *Wilkinson,* 266 U. S. 503; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399; *Mutual Life Insurance Co.* v. *Hill,* 193 U. S. 551; *In re Sanford Fork and Tool Co.,* 160 U. S. 247; *Roberts* v. *Cooper,* 20 How. 467.

On the second appeal the Circuit Court of Appeals could not entertain an appeal from itself to itself, *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 37; *Texas & Pacific Railway Co.* v. *Anderson,* 149 U. S. 237; *Mackall* v. *Richards,* 116 U. S. 45; *Humphrey* v. *Baker,* 103 U. S. 736; *Stewart* v. *Salamon,* 97 U. S. 361; and therefore could only consider whether the decree of the District Court entered pursuant to its mandate and decision upon the first appeal was in conformity therewith.

The Circuit Court of Appeals affirmed, thus determining that the decree of the District Court of July 8, 1932, was in conformity with its mandate and decision on the first appeal.

It is respectfully submitted that this Court is now without power to review the determination of the Circuit Court of Appeals on the first appeal, no application for a writ of

certiorari to review that decree having been made within three months thereafter. Act of February 13, 1925, C. 229, Sec. 8(a), 43 Stat. 936, 940; *Morton* v. *United States,* No. 638, October Term, 1932; *Dubilier Condenser Corporation* v. *Radio Corporation of America,* No. 396, October Term, 1932; *Gotham Can Co.* v. *United States,* 281 U. S. 706; *Hooper* v. *United States,* 274 U. S. 743; *Rust Land & Lumber Co.* v. *Jackson,* 250 U. S. 71.

Since plaintiff's petition for a writ of certiorari sought a review of the decree "entered in the United States Circuit Court of Appeals * * * on the 14th day of February, 1933," (the decree on the second appeal) the instant writ of certiorari to review that decree presents the single question whether the decree of the District Court of July 8, 1932, was in conformity with the mandate and opinion of the Circuit Court of Appeals on the first appeal,—the only question present on the second appeal. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418.

There can be no doubt but that the decree of the District Court of July 8, 1932, dismissing the complaints on the merits, was in conformity with the determination of the Circuit Court of Appeals on the first appeal, in view of the construction of its first decree by that Court on the second appeal.

If there were any doubt, that doubt would disappear upon an examination of the record, which makes it clear that the Circuit Court of Appeals did, by its mandate and decision on the first appeal, dispose of all the issues presented by the complaint on the merits.

II.

The action involves an interference with the internal management of a New Jersey corporation, and as a necessary feature thereof, the construction and interrelation of many New Jersey Statutes, as to which the courts of the corporate domicile afford the proper forum.*

The general right of a court, even where jurisdiction technically exists, to decline jurisdiction in favor of a more appropriate forum is well settled. *Rogers* v. *Guaranty Trust Co., et al.*, 53 Sup. Ct. Rep. 295; *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413; *Langnes* v. *Green*, 282 U. S. 531; *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473; *Heine* v. *New York Life Insurance Co.*, 50 Fed. (2d) 382.

The principles of law determinative of the sufficiency of this defense are completely set forth in the opinion of this Court in *Rogers* v. *Guaranty Trust Co., et al., supra.*

The present cause presents a stronger ground for the declination of jurisdiction than did that case, because the question of compensation fixed by stockholders is a matter more directly affecting the Company's internal affairs than the action of the Directors complained of in that cause and because there are, in addition to the New Jersey statutes involved in that suit, the following New Jersey statutes, whose construction, interpretation and interrelation are vital to a decision of this cause, to wit: General Corporation Act, § 11, (L. 1896, ch. 185, § 11), (By-Laws; power to make and alter);

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* Plaintiff's brief (p. 7), in introducing the discussion of discretionary jurisdiction quotes the phrase, "no question of Federal jurisdiction is presented," from the concluding paragraph of defendants' brief in opposition to the petition for the writ of certiorari. The only apparent object of that quotation is to create the impression that defendants have waived the defense set forth in their answer (R., pp. 52-53) of *forum non conveniens*. If that is the object, the quotation is an inversion of the meaning of the paragraph from which it is taken. The paragraph is merely a summary of Rule 38 of this Court. Defendants have never waived that defense, having pleaded it in their answer and argued it at length in the Circuit Court of Appeals on the first appeal.

General Corporation Act, § 17 (L. 1896, ch. 185, § 17, as amended by L. 1901, ch. 119, § 1), (meetings; Voting); General Corporation Act, § 27 (L. 1896, ch. 185, § 27, as amended by L. 1908, ch. 84, § 1); L. 1932, ch. 192, (Amendments to Chapter 175, L. 1920).

The very wording of the injunction order of the District Court (CAFFEY, *J.*) establishes conclusively that the action involves the internal management of the Company. The order enjoins only "The American Tobacco Company from making any further payments under said by-law to any president or vice-president"; (R., pp. 131-133). Such an order is clearly within the definition of what constitutes the internal affairs of a corporation, in accordance with the opinion of this Court in *Rogers* v. *Guaranty Trust Co.*, and the decisions of the highest courts of New Jersey.

In *Jackson* v. *Hooper*, 76 N. J. Eq. 592, the highest court of New Jersey, in reversing the lower court, said (p. 604):

> "The phrase 'internal affairs of a corporation,' as here used, is well defined in the case of *North State, &c., Mining Co.* v. *Field*, 64 Md. 151, as follows:
>
> > 'Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction.'
>
> The courts of this state do not possess such jurisdiction, and any suggestion of its assumption we emphatically repudiate."

Petitioner asserts two special reasons why this cause should not be sent into New Jersey, which are:

> (1) The Taylor action was originally brought in the Federal Court, jurisdiction resting on the ground of diverse citizenship.

(2) The District Court, even if it had discretion, exercised it in favor of retaining jurisdiction.

The first special reason is answered by the opinion of this Court in *Rogers* v. *Guaranty Trust Co.*, where it is stated (p. 297):

> "It has long been settled doctrine that a court—state or federal—sitting in one State will, as a general rule, decline to interfere with, or control by injunction or otherwise, the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile."

Further, as petitioner concedes, no recovery is sought against Taylor. The suit is in the nature of a declaratory judgment, plaintiff's claim being that Taylor would have been entitled to payment under By-Law XII, if he had not waived that right. This Court has ruled that the Federal Courts have no original jurisdiction of actions for declaratory judgments. *Willing* v. *Chicago Auditorium*, 277 U. S. 274; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

The second special reason is answered by the record which shows that the District Court (CAFFEY, *J.*) did not exercise any discretion, as it stated in its opinion granting an injunction, that "this court is *bound* to exercise jurisdiction and that in *Rogers* v. *Guaranty Trust Co., et al.*, E. 59/307, Judge PATERSON* has not held to the contrary." (R., pp. 129-130): The order entered by the District Court, recited, "And it appearing to the Court that the complaint states a cause of action, and that it is *bound* to exercise jurisdiction of said cause"; (R., p. 132). It appears incontrovertibly from the opinion, therefore, as well as from the decree of the District Court, that no discretion whatsoever was exercised.

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* The Court's reason for making that statement is difficult to understand as Judge PATERSON in dismissing *Rogers* v. *Guaranty Trust Co., et al.*, did not consider or refer to the instant case.

Of course, the District Court erred in holding that it was "bound" to exercise jurisdiction (*Rogers* v. *Guaranty Trust Co.*). But, even if plaintiff were correct in his assertion that the District Court had exercised its discretion in retaining jurisdiction, that exercise should have been in accordance with what was right and equitable under the established practice of the court and decisions in cognate cases.

However, the District Court, in this case, reached a conclusion completely at variance with the sound discretion exercised by Judge PATERSON, and upheld by this Court, in *Rogers* v. *Guaranty Trust Co.* That conclusion is, therefore, subject to review and reversal by this Court. (*Lanmes* v. *Green,* 282 U. S. 531, 541-542.) In the last mentioned case it was held that the failure of the District Court to exercise a sound discretion called for the corrective exercise of this Court's appellate authority.

Plaintiff asserts (Pltf's Br., p. 8) that to send this case to New Jersey would be to deny all relief, as it cannot be assumed that the principal defendants would voluntarily subject themselves to the jurisdiction of the New Jersey courts.

The same argument was made in *Rogers* v. *Guaranty Trust Co., et al., supra,* and held to be of no avail. Moreover, in a suit instituted by plaintiff in New Jersey against these defendants and others, following that decision by this Court, all of the defendants have voluntarily appeared.

Aside from that, however, that assumption of plaintiff does not affect the principle involved as the instant case is similar to suits for assessment of stock where the propriety and the amount of the assessment are dependent upon the laws of the State of the corporate domicile and must first be determined by the courts of the corporate domicile and, when so determined, are binding everywhere. *McDermott* v. *Woodhouse,* 87 N. J. Eq. 615; *Glenn* v. *Liggett,* 135 U. S. 533. Therefore, in the present situation, as in the case of

assessments, the issue of the validity of corporate action should be decided by the courts of New Jersey by every rule of justice and reason as well as of convenience. Such a judgment would have to be recognized by every other jurisdiction.

The Company is not one that merely as a matter of convenience, was organized in New Jersey and keeps all or substantially all of its assets and does all of its business in New York. Its activities are worldwide. Its principal office is located in New Jersey and all of its stockholders' meetings are held there (R., pp. 49, 50). It has factories and a number of branches in that State and maintains bank accounts there.

A judgment in New Jersey obtained in a stockholder's suit affecting the validity of the By-Law would be binding in every other jurisdiction. (*Glenn* v. *Liggett*, 135 U. S. 533.) Such a determination would be binding upon the Company, its directors and stockholders, and the judgment *res judicata* against all. *Goodbody* v. *Delaney*, 80 N. J. Eq. 417; *Willoughby* v. *Chicago Junction Railways & etc., Co.*, 50 N. J. Eq. 656.

A judgment rendered by a local court, whether Federal or State, in another jurisdiction would have attached to it all the infirmities pointed out by this Court in *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, where it said (p. 551):

> "* * * The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation. We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State. * * *"

On the other hand, the courts of New Jersey would not be bound by the construction placed upon the statutes of their State by any other court.

Recently in *First National Bank of Lyndhurst* v. *Bianchi & Smith,* 106 N. J. Eq. 333, the court after referring to a decision of a Federal Circuit Court of Appeals construing a New Jersey statute said (p. 335):

> "* * * But this court is not bound by that decision. In construing state statutes it is the province of our courts to lead, not to follow, those of federal or other foreign jurisdictions."

That decision is in conformity with the case of *Kimball* v. *St. Louis & San Francisco Railroad Co.,* 157 Mass. 7, where stockholders of a Missouri corporation brought suit in Massachusetts to enjoin an issue of bonds which the corporation proposed to sell. The court dismissed the bill, Mr. Justice HOLMES saying (p. 8):

> "But it seems to us clear that, as among the States of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law."

A case in point is *Moore* v. *Silver Valley Mining Co.,* 104 N. C. 534, where a suit was instituted by a stockholder to redress wrongs to a Maryland corporation, in which the charter and the by-laws of the company were sought to be interpreted and construed, thus involving questions dependent upon the laws of the State of Maryland, defendant's corporate domicile. In denying relief, the Court said (p. 545):

> "* * * The plaintiff seeks unnecessarily and improperly to bring a foreign corporation into this State

> as a defendant in this action, and have the Courts here interpret its charter and by-laws and the regularity and sufficiency of its proceedings and the laws of the State of Maryland bearing on the same. Ordinarily, the Courts of the latter State properly have the exclusive jurisdiction of such matters and things—this should be settled by the proper Courts there. There is total absence of necessity for such extraordinary procedure here, and the Courts of this State will not unnecessarily entertain an action for such purpose. * * *"

Plaintiff relies upon *Mayer* v. *Oxidation Products Co., Inc.*, 119 N. J. Eq. 141. The facts there were these: A motion for an injunction was sought against directors who had voted salaries to themselves. It appeared that, although the corporation was organized in another State, such incorporation was a mere formality for convenience. All of the property, persons, and officers were in the State of New Jersey. No assets were in the corporate domicile. The Vice Chancellor *denied* the motion for an injunction but indicated that he differed from the ruling of the highest court of the State in *Jackson* v. *Hooper*, 76 N. J. Eq. 592.

Recently in *Hamilton* v. *United Laundries Corp.*, 111 N. J. Eq. 78, the rule laid down in *Jackson* v. *Hooper*, 76 N. J. Eq. 592, was unqualifiedly approved and followed.

Plaintiff relies also on *Ernst* v. *Rutherford*, 38 App. Div. 388. That case involved an illegal appropriation of assets.

III.

Plaintiff has failed to comply with Equity Rule 27.

The complaint does not allege that any demand was made by plaintiff upon the stockholders to take any action with respect to Article XII, or give the causes of plaintiff's failure to seek such action, or any reason for not making the effort. The complaint does not allege that the individual defendants owned or controlled the majority of the outstanding stock of

the Company. The complaint does not allege any unlawful combination of the majority of the stockholders. The complaint contains no allegation that an appeal to the stockholders would be futile or that any emergency existed that warranted plaintiff in not resorting to the stockholders.

The existence of Article XII, *for nearly twenty years,* is proof in itself that no emergency could have been set forth in the complaint.

Article XII provides by its very terms:

> "This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors" (R., p. 38).

Thus, the Company's stockholders have provided, that if any such relief is sought with reference to this By-Law, that relief should first be sought from the stockholders. Plaintiff attempts to violate this enactment without giving the stockholders any vote in this matter so vital to them—and his excuse is that he does so in their interest—but their failure to take the prescribed and easy course open to them of repealing the By-Law shows that they emphatically disagree with him.

The State of New Jersey has an unique statute which in effect provides for a referendum and recall with respect to corporate management.

This statute is Section 46, Chapter 185 of the Laws of 1896 of the State of New Jersey. The germane provisions of that Act provide:

> "* * * three or more stockholders having voting powers may call [a] meeting by publishing ten days' notice of the time, place and purposes of the meeting in a newspaper published in the county in which its principal office in this state is located, and mailing such notice to all stockholders whose post office address is known or can be ascertained; a meeting called as aforesaid shall be a *legal meeting* of the corporation, * * *."

Plaintiff, under that statute, could have joined with any two stockholders to call a "legal meeting" for the purpose of taking action with reference to Article XII. But, in this matter of internal affairs, plaintiff disregarded completely the remedy afforded him under Article XII as well as under the statute law of New Jersey.

In *United Copper Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, and *Wathen* v. *Jackson Oil Co.*, 235 U. S. 635, this Court has held that Rule 27 must be complied with by a stockholder.

In *Stone, et al.* v. *Holly Hill Fruit Products, Inc.*, 56 Fed. (2d) 553, SIBLEY, *C. J.*, in sustaining a dismissal of the complaint, because of a failure to comply with Rule 27, stated (p. 554):

> "* * * If it had been distinctly alleged that all four of the directors who are joined as defendants were so involved as to make application to them obviously futile, there should have been an effort made through the stockholders to control or supplant them. It is not alleged that there is any wrong combination of a majority of the stockholders, but only that they live at a distance, are ignorant of the situation, and send their proxies to the president. The plain remedy for that would be to seek another stockholders' meeting, after informing the other stockholders of the situation and asking them to withdraw their proxies and to attend. A stockholder, in taking stock in the ordinary corporation, submits, within the charter limits, to a guidance of the corporate affairs according to the will of the owners of a majority of the stock and through the directors whom the majority choose. The minority have a right to have the majority exercise their judgment, and to exercise it honestly and not fraudulently, but have no right to have a court substitute their own ideas and wishes for those of the majority, and that in advance of any refusal of the majority to hear and decide on the matter at issue. Minority stockholders may not in the absence of sudden emergency ask a court of equity

to interfere in the management of their corporation until they have earnestly and unsuccessfully sought redress from the Board of Directors, and where appropriate also from the stockholders in meeting, unless they can show sufficient reasons for not doing so. This is implied in the provisions of Equity Rule 27 (28 USCA Sec. 723)."

To summarize: Article XII was adopted by an overwhelming majority of the stockholders; the defendants had nothing to do with its adoption; the complaint does not proceed upon any theory of fraud; and plaintiff became a stockholder five years after its adoption. Plaintiff does not even allege that the previous owner of the stock which he owns did not vote for its adoption. Under the law of New Jersey, it is essential that complainant show in the complaint that his shares are not burdened by the acquiescence of the previous holders of his stock. *O'Connor* v. *International Silver Co.*, 68 N. J. Eq. 67; *U. S. Steel Corporation* v. *Hodge*, 64 N. J. Eq. 807.

Plaintiff contents himself with meeting the necessity of complying with Rule 27 by an assertion that the by-law is invalid and, therefore, need not be repealed, or if valid, the total compensation is still subject to review and the principle cannot apply. The Rule very specifically states that it applies to "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the Corporation." Cf. *Squair* v. *Lookout Mountain Co.*, 42 Fed. 729, where the Court said (732), "It will not do to permit the complainant's judgment and opinion to nullify and abrogate the rule."

If ever a situation has developed which necessitates the consultation of stockholders, it is present in this case, which involves the compensation of those upon whom the very life of the business depends, and where the stockholders have formally declared that no change or interference with this

underlying principle of compensation shall be made without their vote.

If, under these circumstances, Rule 27 does not apply, it would seem that the Rule has no significance or effect whatsoever.

IV.

Article XII is legal, *intra vires*, and valid.

Plaintiff asserts in this Court that the By-Law is invalid because, as he alleges:

> (1) The charter of the Company granted by the State of New Jersey did not authorize the payment to any officer or other employe of compensation measured by its profits.
>
> (2) Under the General Corporation Law of New Jersey compensation to its officers and other employes, measured by the profits, was not legal prior to the passage of Chapter 175 of the Public Laws of 1920.
>
> (3) The power to make and alter By-Laws of the Company was conferred exclusively on the Directors, and the stockholders had no power to adopt Article XII.

Plaintiff's contentions will be answered *seriatim*.

(1) There is nothing in the Charter that prohibits the payment to the officers or other employes of the Company of compensation measured by its profits.

Article II of the Company's Charter provides, in part:

> "The said merged corporation, in addition to the powers conferred by Section 1 of the Act Concerning Corporations (Revision of 1896) shall have the powers herein set out, and said merged corporation shall be

subject to the limitations on said powers herein set out, * * * (R., p. 18):

* * * * * * * * *

"* * * The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; *and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in.* All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine, and neither the property so acquired nor any of its capital stock held by the corporation shall be regarded as accumulated profits, for the purpose of declaration or payment of dividends, unless otherwise determined by the directors. * * *" (R., p. 19.)

This is the only provision in the Charter which deals with the disposition of surplus, profits, or earnings. Obviously, it does not purport to restrict the power of the stockholders in respect thereto. It does authorize the directors to fix the amount of dividends, if not fixed by the By-Laws, and the amount to be reserved as working capital, but, in addition, it gives the Directors the general power "to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in." It is axiomatic that Directors have power to hire employes, or else there could be no profits. The right to hire must include the right to compensate. The right to compensate must include the right to determine whether the compensation shall be fixed or contingent or both.

The allegation in the complaint that the Directors were empowered to apply any surplus or net profits or earnings

only to the acquisition of property or to the payment of dividends is in direct conflict with the Charter provisions. Moreover, the Charter of the Company makes use of the words, "surplus or net profits or earnings." There can be no "surplus or net profits" until the expenses of doing business are paid. Compensation to officers, as to any other agents, is an operating expenditure of the Company. It makes no difference whether the compensation is in the form of a fixed salary or measured by the net profits of the Company. It would prevent the employment of agents on a commission basis, a practice as old as history. It would require a precise provision, free from any ambiguity, to justify such an inhibition.

If it be assumed that the Charter so limited the power of the Directors, it would not follow that there would be a like limitation upon the power of the stockholders. It is fundamental that the residual power over corporate funds is lodged with the stockholders, the ultimate owners of the assets of the Company.

The advantage of having stockholders fix the contingent compensation is to remove the subject entirely from the realm of executives who may be affected and thereby to place it beyond the reach of self interest or indiscretion.

Whether Article XII is construed as providing for compensation by a participation in the profits or for compensation measured by the amount of profits, such a provision for compensation would in either event constitute an item of expense in the operation of the business. The right of a corporation to permit profit participation as means of compensation to its officers and other employes is now so well recognized in New Jersey as not to be debatable. *Bennett* v. *Millville Improvement Co.*,* 67 N. J. L. 320; *Booth* v. *Beattie*, 95 N. J. Eq. 776, affd. 95 N. J. Eq. 776.

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*This case was decided by the Court of Errors and Appeals the highest court of New Jersey.

(2) Under the General Corporation Act of New Jersey (Revision of 1896) the stockholders have always had the power to pay officers a contingent additional salary measured by the net profits of the corporation.

The company was organized in 1904. Article XII was adopted in 1912. Article XII provides expressly that the amount to be paid to the six executive officers is to be paid "as salary for the year, in addition to the fixed salary of each of said officers."

The Charter of the Company, in Article II, provides: "The said merged corporation, in addition to the powers conferred by Section 1 of the Act Concerning Corporations (Revision of 1896), shall have the powers herein set out, * * *" (R., p. 18).

Section 1 of the General Corporation Act of New Jersey provides, among other things:

> "Every corporation shall have power:
>
> * * * * * * * * * *
>
> "V. To appoint such officers and agents as the business of the corporation shall require, and to allow them suitable compensation."

The contingent additional salary measured by profits of the Company, expressly described in Article XII as "additional salary" was allowed by the stockholders and comes within the express powers delegated to the Company by the General Corporation Act of New Jersey.

The precise question here presented had already been decided many years before the enactment of Chap. 175 of the Laws of 1920, by the Court of Errors and Appeals of New Jersey in *Bennett* v. *Millville Improvement Co.** (1902), 67 N. J. L. 320.

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* Plaintiff's brief (p. 17) states of *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320, that the court that decided it was "not a court of last resort, * * *." The fact is that the Court of Errors and Appeals was then, and is now, the court of "last resort in all causes." (New Jersey Constitution, Article VI, Section I.)

There, plaintiff, employed to construct a glass works for the defendant, and, after its construction, to manage its operations, was to be paid a fixed compensation and one-sixth of the net profits of the company's business. He brought suit for the one-sixth and defendant there relied upon § 47 of the General Corporation Act of New Jersey (L. 1901, Ch. 110, § 2), which provides that:

> "Unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation * * * shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amounts so reserved, and pay the same to such stockholders on demand."

The contention of defendant in that case that the corporation could not pay compensation based upon the profits, the same contention raised here by plaintiff, was swept aside by the Court, which held (p. 323):

> "* * * But this one-sixth proposed to be given to the plaintiff was salary—payment for services—and not part of the profits, but part of the expenses of the business, and if the corporation had permitted its president, by acquiescence or by receiving the benefit of the services for which this one-sixth was to pay to make this arrangement, then the corporation was as much bound to pay this as to pay the fixed salary which they had agreed to. The profits referred to in Section 47 were not ascertained until this expense of conducting the business had been paid."

Plaintiff criticises the case upon the ground that the Court disregards the distinction between profits and working expenses. But the court expressly recognizes the distinction and holds that a share of the profits paid as compen-

sation falls on the expense side of the ledger. This case states the law of New Jersey governing the internal affairs of a New Jersey corporation. Therefore, plaintiff, as every other stockholder, must abide by the controlling effect of that decision in respect to this Company's internal affairs. Cf. *Rogers* v. *Guaranty Trust Co., et al.,* 53 Sup. Ct. Rep. 295.

Plaintiff cites no New Jersey case in support of his position; there is none; the two cases he cites (*Eyster* v. *Centennial Board of Finance,* 94 U. S. 500, 503; *Harrison* v. *London Assurance Corp.,* 10 App. Cas. 438, 450), have no bearing.

Plaintiff states that his position is based primarily upon the provisions of the Company's charter (Pltf's Br., p. 17). It should therefore be noted that the similarity between the charter of the Company and the statute before the court of last resort of New Jersey in *Bennett* v. *Millville Improvement Co.,* is most marked; indeed it is quite obvious that the charter of the Company was based upon the statute referred to in the *Bennett* case which statute is still in full force and effect.

The right to pay compensation by way of participation in the net profits was recognized and reaffirmed subsequently in New Jersey by the following cases: *Smith* v. *Bedell Bros.,* 84 N. J. Eq. 268; affd. 84 N. J. Eq. 509; *Booth* v. *Beattie,* 95 N. J. Eq. 776, affd. 95 N. J. Eq. 776; *Costello* v. *Thomas Cusack Co.,* 96 N. J. Eq. 95.

In every case, which we have examined, involving the right of a corporation to pay its officers compensation based upon a participation in the net profits, that right has been sustained. Cf. *Harker* v. *Ralston Purina Co.,* 45 Fed. (2d) 929, certiorari denied 284 U. S. 619; *Church* v. *Harnit,* 35 Fed. (2d) 499, certiorari denied, 281 U. S. 732; *Young* v. *U. S. Mortgage & Trust Co.,* 214 N. Y. 279; *Neff* v. *Gas & Electric Shop,* 232 Ky. 66; *Zwolanek* v. *Baker Mfg. Co.,* 150 Wis. 517; *Putnam* v. *Juvenile Shoe Corp.,* 307 Mo. 74;

Ransome Concrete Machinery Co. v. *Moody,* 282 Fed. 29; *Matter of Rosenberg,* 213 N. Y. App. Div. 167, 169.

Plaintiff calls attention to the Act of 1932, Chap. 192 amending Chap. 175 of the Laws of 1920, and says of it (Pltf's Br., p. 19) that "It is evident on the face that this so-called curative act was introduced and passed to meet the very situation developed by this litigation. No Legislature on its own motion would go so far out of its way to pass an act of such limited application."

If plaintiff means that the defendants in the instant case, or any one connected or associated with them, requested that amendment, or had anything to do with it, it is an utterly unfounded inference and entirely contrary to the fact.

Plaintiff lays great stress upon that amendment, and contends of it that it shows that no prior law of New Jersey authorized Article XII.

That contention of plaintiff disregards the controlling authority of *Bennett* v. *Millville Improvement Company,* 67 N. J. L. 320 decided long before the passage of Chapter 175 of the Laws of 1920. Moreover, Section 4 of that Act provides:

> "The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this State."

It is a fundamental principle of statutory construction that a legislative body in enacting legislation must be considered to have knowledge of the decisions of its highest court. *Hecht* v. *Malley,* 265 U. S. 144, 153.

If this recent amendment has any significance—and its effect has never been construed by any New Jersey court—it is merely a codification of the case law of New Jersey that it is within the express powers of a corporation to compensate its officers by means of a participation in the profits (cf. *Bennett* v. *Millville Improvement Company,* 67 N. J. L. 320;

Smith v. *Bedell Bros.*, 84 N. J. Eq. 268, affd. 84 N. J. Eq. 509; *Booth* v. *Beattie*, 95 N. J. Eq. 776, affd. 95 N. J. Eq. 776) and that its stockholders have full power to ratify transactions of directors with their corporations. (*Cf. United States Steel Corporation* v. *Hodge*, 64 N. J. Eq. 807; *Endicott* v. *Marvel*, 83 N. J. Eq. 632.)

A. ARTICLE XII, DULY ADOPTED BY THE SHAREHOLDERS CREATED A CONTRACT WITH THE OFFICERS WHICH IS UNASSAILABLE AS TO ALL COMPENSATION EARNED.

The contract between each of the individual defendants and the Company is as binding as any other agreement made between a corporation and its agents.

Article XII calls this additional compensation "salary for the year, in addition to the fixed salary"* (R., p. 14).

The courts do not permit even all of the stockholders to repudiate a contract made between a corporation and employes where the corporation has enjoyed the benefits thereof. A contrary rule would destroy contract rights. *Metropolitan Rubber Co.* v. *Place*, 147 Fed. 90; *Zwolanek* v. *Baker Mfg. Co.*, 150 Wis. 517; *Ginter* v. *Heco Envelope Company*, 316 Ill. 183.

In *Metropolitan Rubber Co.* v. *Place*, 147 Fed. 90, the Circuit Court of Appeals for the Second Circuit, speaking through WALLACE, *C. J.*, held that a by-law of a corporation providing for payment of salary to an officer was in fact an implied agreement by the corporation to pay such salary.

In *Zwolanek* v. *Baker Mfg. Co.*, 150 Wis. 517, plaintiff brought suit to recover a share of the surplus earnings of defendant based upon the following facts: Defendant's by-law provided for the participation by employes in its surplus earnings; pursuant thereto, defendant offered to permit its employes to participate in those earnings provided they re-

* The learned dissenting Judge in the Circuit Court of Appeals was under misapprehension as to the context of Article XII, as he states in his opinion: "The by-law does not expressly say that the payments provided for are by way of additional compensation to the officers, * * *" (R., p. 146).

mained in its employ for a specified period. Plaintiff remained the specified period. He had a written contract which provided for a stated salary, which was silent as to the compensation under the by-law. The stated salary had been paid.

The Trial Court dismissed the complaint, but the Supreme Court of Wisconsin, despite the existence of that written contract, held that the by-law created an unassailable contract between plaintiff and defendant, and said (p. 521):

> "* * * To allow the employer in such a case to repudiate liability on the ground stated would come perilously near conniving at the perpetration of a fraud; and no court should say that in such a case the by-law merely affected the corporation, and not third persons. The rule contended for was not established to meet such a situation, and does not meet it. If corporations desire to have their so-called 'by-law' affect only the corporation and its shareholders, then they should refrain from exploiting them to third persons, for the purpose of inducing such persons to act in reliance thereon."

The fact that Article XII was in existence, and the defendants rendered services upon the expectation and understanding that they would be paid therefor, entitles them to compensation thereunder. *Corinne Mill, Canal & Stock Co.* v. *Toponce*, 152 U. S. 405; *Fitzgerald and Mallory Construction Co.* v. *Fitzgerald*, 137 U. S. 98; *Chandler* v. *Monmouth Bank*, 13 N. J. L. 255; *In re Gouverneur Pub. Co.*, 168 Fed. 113; *Wellington Bull & Co., Inc.* v. *Morris*, 132 Misc. 509, affd. 226 App. Div. 868; *Montana Tonapah Mining Co.* v. *Dunlap*, 196 Fed. 612; *Fox* v. *Arctic Placer Mining & Milling Co.*, 229 N. Y. 124; *Bagley* v. *Carthage, W. & S. H. R. R. Co.*, 165 N. Y. 179; *Zwolanek* v. *Baker Mfg. Co.*, 150 Wis. 517.

B. THE COMPLAINT DOES NOT CHARGE ANY FRAUD.

No fraud is alleged in the complaint and indeed none could be shown.

The Circuit Court of Appeals found:

> "There is no claim in the bill, nor can the argument be maintained, that there was any fraud or collusion in the passage of this by-law between appellants [defendants] who have enjoyed the fruits of its enactment and the corporation" (Record, p. 144).

Neither does the bill allege that this is a case of a majority appropriating the assets of the corporation to the injury of the minority. There is little doubt, but, that if a majority of the stockholders thought it were not for the best interests of the Company that the officers should have this added incentive, they would change it by regular corporate procedure.

In March, 1931, each stockholder was mailed a pamphlet which, in addition to summarizing the provisions of Article XII, gave complete information respecting its operation (R., pp. 88-90), notwithstanding which no stockholder, aside from plaintiff, has taken any steps within or without the corporation to repeal or change it. Since the mailing of that pamphlet, three annual stockholders' meetings have been held, as the by-laws prescribe that the annual meeting of stockholders shall be held on the first Wednesday in April of each year (R., p. 30). It is fair to say that the inaction of the stockholders over the many years of this By-Law's existence is conclusive proof that it and its operation meets with their entire satisfaction.

It is not possible to describe fully within the limited confines of a brief the variety and complexity of the services that the defendants are called upon to render.

Defendant Hill has the general supervision of all the departments of the Company, including sales, advertising, foreign operations, manufacturing, exporting, auditing, and purchasing of leaf tobacco (R., p. 58). His supervision does not mean a mere cursory passing upon the functions of the departments that constitute this great enterprise (R., p. 58); it involves an actual participation in the program of each of

the departments (R., p. 58). He is the executive head and directing genius of the Company.

The late defendant Penn, together with defendant Neiley, had charge of the manufacturing. Under their management, there has been a concentration in the handling of the different tobacco products, a uniformity of production, and an economy of manufacturing. Penn discovered the "Toasting Process" which has resulted in the expulsion of the harsh irritants that had theretofore appeared in cigarettes, and constituted the "bite" in tobacco. He developed machines to distribute the proper amount of tobacco on the cigarette paper so that the cigarette should have the proper weight in accordance with a pre-determined formula; he developed machines for the packing, wrapping and counting of cigarettes (R., pp. 61-62).

Hill and Penn together created the "Lucky Strike" cigarette (R., p. 56), the manufacture and sale of which constitutes a large part of the Company's business.

Defendant Mower was vice-president in charge of the English branch of the business. Under his guidance the sale of cigarettes in England mounted from 365,000 cigarettes per day in 1928 to over 12,000,000 cigarettes per day in 1931, and that at a time when England was in the throes of a depression. His devotion to the Company was such that it resulted in his physical breakdown, which compelled his resignation (R., pp. 63-64).

Defendant Riggio is the vice-president in charge of sales and advertising, responsible for the organization and functioning of the sales department. This department covers the entire country and places the burden upon Riggio of maintaining the sales organization up to the highest degree of efficiency (R., pp. 64-66).

One of the great difficulties and problems of the tobacco industry, and particularly applicable to cigarettes, is the maintenance of the supply of tobacco. Tobacco must be purchased two or more years in advance in order to put it in

proper condition for use in the manufacture of the Company's different products (R., p. 59). This in itself requires an accurate forecast as to the amount necessary for the Company's requirements for two years in advance. It is obvious that if the Company should have a great excess supply of tobacco on hand, due to the failure to anticipate correctly its future needs, the economic effect would be as serious as the failure to have an adequate supply.

The distinctive flavor or "taste" of each brand of the Company's products, whether it be cigarettes, cigars, or pipe tobacco, must be maintained (R., pp. 60, 66). Even tobacco from the same territory varies from year to year as to its quality as well as its peculiar flavor (R., pp. 59-60). Therefore, the greatest care must be used in the purchase of tobacco because to maintain the consistency of the blends, the purchaser of tobacco from any particular territory must take into consideration the variations thereof.

Upon that state of the record the learned dissenting judge in the Circuit Court of Appeals stated that in his opinion the payment of $840,000, "to an officer receiving a fixed salary of $168,000, is presumptively so much beyond fair compensation for services as to make a *prima facie* showing that the corporation is giving away money" (R., p. 146).

But this has not been the opinion of the stockholders of the Company. They determined that compensation, measured by a percentage of the net profits in excess of $11,369,000, provides the necessary incentive to the management for the creation of profits in excess of that sum. How can it be presumed that stockholders of this Company, who have received by way of cash dividends since 1915 over $300,000,000 (R., p. 84-A), are not correct in believing that the application of Article XII was responsible for those profits to them, as well as for the corresponding reward to those who made those profits possible. They may well feel justified in continuing a course which has brought them such great profits.

This Company has undoubtedly many stockholders who own shares in many other corporations. When they look at their portfolio of investments and compare the results obtained for them in this Company with the results obtained from their other investments, the presumption, and the only presumption, is that these stockholders must feel convinced that they have wisely acted in their own best interest in retaining Article XII as a part of the organic law of this Company.

In *United States Steel Corporation* v. *Hodge*, 64 N. J. Eq. 807, the New Jersey Court of Errors and Appeals said (pp. 816, 817):

> "The like view is expressed by the Court of Appeals of Maryland in *Shaw* v. *Davis*, 78 Md. 308, as follows: 'It may be stated as the result of all the authorities, that whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither *ultra vires*, fraudulent or illegal, the court will refuse its intervention because powerless to grant it, and will leave all such matters to be disposed of by *the majority* of the stockholders in such manner as their interest may dictate, and their action will be binding on all, whether approved of by the minority or not.'
>
> * * * * * * * * *
>
> As was declared in that case [*Berger* v. *U. S. Steel Corp.*, 63 N. J. Eq. 809] (citing *Ellerman* v. *Chicago Junction Co.*, 4 Dick. Ch. Rep. 217), individual stockholders cannot question, in judicial proceedings, corporate acts of directors, if the same are within the powers of the corporation and in furtherance of its purposes, are not unlawful or against good morals, are done in good faith and in the exercise of an honest judgment.
>
> *Much less can a shareholder challenge like action taken by a majority of his co-stockholders.*"

C. Cases cited by plaintiff have no application.

Plaintiff contends that, under the provisions of the charter, the funds of the Company can be applied only (1) "to put into a reserve fund to acquire property as directed by the board," or (2) "to the payment of dividends," and, therefore, there is a limitation of power which implies the exclusion of all others, including the payment of compensation to its agents measured by its profits.

In support of that contention he cites *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 28. There it was held that, to measure the powers granted a corporation, its charter must be read in the light of any general applicable laws.

But the general law applicable to every corporation is that it is an implied, if not an express, power of a corporation to pay its officers, agents, and employes compensation based upon a share of the profits. Indeed, in every case in which that question has been presented to the courts, whether Federal or State, that power has been upheld.*

In New Jersey the courts have gone further, and have held that such power is within the express powers granted to a corporation under the statute. *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320.

In *Park* v. *Grant Locomotive Works*, 40 N. J. Eq. 114, another case relied upon by plaintiff, the court gave the following sensible definition of "net profits" (p. 121):

> "The words 'net profits' define themselves. They mean what shall remain, as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution."

What can be a more legitimate expense in the conduct of corporate business than the payment of salaries?

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* *Supra*, page 29.

The other cases cited by plaintiff fall into the following categories:

(1) an attempt by a going railroad or business corporation to sell or lease all of its assets to another corporation. *Kean* v. *Johnson*, 9 N. J. Eq. 401; *Black* v. *Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455; *Mills* v. *Central R. R.*, 41 N. J. Eq. 1; *Colgate* v. *U. S. Leather Co.*, 75 N. J. Eq. 229; *Riker & Son Co.* v. *United Drug Co.*, 79 N. J. Eq. 580;

(2) a complete variation in the character of the business for which the corporation was originally incorporated. *Zabriskie* v. *Hackensack & N. Y. R. R. Co.*, 18 N. J. Eq. 178;

(3) a change in the voting rights of the stock. *Lowenthal* v. *Rubber Reclaiming Co.*, 52 N. J. Eq. 440; *In re Newark Library Assn.*, 64 N. J. L. 217;

(4) the substitution of preferred stock for common stock. *Einstein* v. *Raritan Woolen Mills*, 74 N. J. Eq. 624.

(3) The stockholders of a New Jersey corporation have complete power over its by-laws.

The Company's charter, issued in 1904, provides:

> "The power to make and alter by-laws of said merged corporation is conferred upon the directors" (R., p. 19).

Plaintiff's position is that this charter provision emasculates all power in the stockholders over the Company's By-Laws.

But § 11 of the General Corporation Act of New Jersey (Rev. L. 1896, Ch. 185, § 11) provides:

> "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon

> the directors; *by-laws made by the directors under power so conferred may be altered or repealed by the stockholders.*"

Plaintiff thus disregards completely the plain language of § 11, just quoted, and attempts to construe the charter provision as exclusive.

Article II of the charter provides:

> "II. The said merged corporation, in addition to the powers conferred by Section 1 of the Act Concerning Corporations (Revision of 1896), shall have the powers herein set out, and said merged corporation shall be subject to the limitations on said powers herein set out, to wit: * * *" (R., p. 18).

Section 1 of the Act confers upon every corporation the power:

> "VI. To make by-laws fixing and altering the number of its directors, and providing for the management of its property, the regulation and government of its affairs, * * *."

It is thus clear from the statutes, which govern the Company, that the stockholders had full power to adopt Article XII.

This question has been finally determined by the highest court in New Jersey in *In Re Griffing Iron Co.*, 63 N. J. L. 168, affirmed on the opinion below, 63 N. J. L. 357, where the court declared (p. 171):

> "* * * That the stockholders had delegated to the directors power to amend the by-laws did not curtail their own power to amend them, and of course the later statute [revision of 1896] removed all possible restriction on such power."

Again in the same case the Court said (p. 172):

> "* * * We are referred to numerous decisions that, in the absence of fraud or abuse of trust, stock-

> holders must submit to the control of a corporation by its directors during their term of office. These decisions all relate to collateral attack. They have no reference to direct action of the stockholders taken by legitimate and orderly methods. The right to take such action is inherent, though generally declared and directed by statute. *Thomp. on Corp.*, § 3972. It would be preposterous to leave the real owners of the corporate property at the mercy of their agents, and the law has not done so. Our statute authorizes action by the stockholders under by-laws subject to alteration. Special meetings of the stockholders may be held under the by-laws, or, in case of necessity, under the statute. Sections 1, 2, 17, 46. * * *"

The power to amend includes the power to add or change.

By way of analogy it may be noted that the power to amend the Constitution of the United States includes the power to make additions thereto, such as, e. g., the Eighteenth Amendment. *Rhode Island* v. *Palmer*, 253 U. S. 350; *Christian Feigenspan, Inc.* v. *Bodine*, 264 Fed. 186, 190, affd. 253 U. S. 350.

Plaintiff cites authorities from jurisdictions other than New Jersey in support of his contention that the stockholders of a New Jersey corporation have no power to adopt by-laws for it. Each of the cited cases rests upon a specific statute that confers exclusive power to make by-laws upon the directors. The cases are from Illinois, Indiana, Wisconsin, Oregon, Manitoba, Ontario, and England, and in each instance the court pointed out that the statute had changed the general rule that the power to make by-laws vested exclusively in stockholders.

A typical example is *Manufacturers Exhibition Bldg. Co.* v. *Landay*, 219 Ill. 168, in which the Supreme Court of Illinois held that under the Illinois Statute the exclusive power to make by-laws was vested in the directors. The Court—after it had pointed out that under the common law

it was the duty of the stockholders to enact by-laws—said (pp. 176-7):

> "But where, as in our State, there is a statute specially providing the mode and manner in which a corporation is organized and controlled and its by-laws enacted, under which statute this corporation has its existence, if any particular manner is pointed out by the statute as to the manner in which the by-laws should be adopted we are unable to see how any other legal method could be resorted to."

Plaintiff in his brief states (p. 21), "By-Laws enacted by the stockholders in such case

> 'are lacking in validity or legal force and effect'" (citing Fletcher on Corporations).

To reach that conclusion, plaintiff quotes that single phrase from a sentence, which quotation standing by itself distorts the meaning of the complete sentence, and permits of a perversion of its actual purport.

The full context of that sentence from which the quoted phrase is taken reads (Fletcher, Sec. 4172):

> "It would seem to be the general rule, therefore, that by-laws adopted by the directors or governing body when the power of adoption remains in the stockholders or members, or by the latter when the power of adoption has been delegated to, or vested by statute in, the governing body, are lacking in validity or legal force and effect."

But the statute of New Jersey, differing from the statutes of the States of Illinois, Indiana, Wisconsin, Oregon, etc., provides expressly that the stockholders have complete power over by-laws. In *Re Griffing Iron Co.*, 63 N. J. L. 168, aff'd 63 N. J. L. 357.

Likewise, *Thompson on Corporations* (Sec. 1018), relied upon by plaintiff, states that the power to adopt by-laws is

by common law and general law, unless otherwise provided by statute, lodged with the stockholders of a corporation.

In *Lillard* v. *Oil, Paint and Drug Co.*, 70 N. J. Eq. 197, 206, the Court pointed out that, if the stockholders had no power to fix the compensation the corporation might not be able to employ any director as an agent against the objection of any stockholder.

Plaintiff cites the decision of the Vice-Chancellor in *Scott* v. *P. Lorillard & Co.*, 108 N. J. Eq. 153, and quotes from a dictum contained in the opinion, which was so obviously contrary to the opinion of the Court of Errors and Appeals that, in affirming that decision, the Court said (*Scott* v. *P. Lorillard & Co.*, 109 N. J. Eq. 417):

> "The reasons for our determination are as stated in the opinion filed in the court below * * *; except however as to such part thereof as expresses an apprehension that the passage of the disputed by-law by the stockholders was beyond their jurisdiction and was an encroachment on the powers of the board of directors. The vice-chancellor's observations in that respect are not essential to the conclusion reached and as to them we reserve opinion."

Plaintiff contends that Article XII cannot bind the holders of Common Stock B. This stock came into existence eight years after Article XII was adopted and had become an integral part of the Company's organic law. As a fundamental principle of corporate law, the holders of Common Stock B, just as the holders of Common Stock, are bound by all of its by-laws. *Baumohl* v. *Goldstein*, 95 N. J. Eq. 597; *Kavanaugh* v. *Commonwealth Trust Co.*, 223 N. Y. 103, 107; *Richardson* v. *Devine*, 193 Mass. 336.

In *Kavanaugh* v. *Commonwealth Trust Co.*, 223 N. Y. 103, the Court said (p. 107):

> "When a by-law is adopted, it is as much the law of the corporation as if its provisions had been a part of the charter. (*Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159, 179; *Hun* v. *Cary*, 82 N. Y. 65)."

In *State* v. *Shaw*, 103 Ohio St. 660, the Supreme Court of Ohio said (p. 669):

> "* * * When stockholders subscribe to stock in a corporation they are deemed to know the statutory law governing corporations, and *they are also deemed to know the provisions of the corporation's rules and regulations*, and they therefore impliedly, if not expressly, agree to abide by such regulations. Such regulations have been uniformly recognized as essential to orderly action in the business of the corporation and they would become a farce and worse than a plaything if not recognized and enforced."

Plaintiff's position amounts to this: In this case he asserts that the stockholders had no right to fix the compensation of the directors who were employes. In *Rogers* v. *Guaranty Trust Co., et al.*, 53 Sup. Ct. 295, he asserted that the directors had no right to fix their own compensation. If the directors cannot fix their own compensation as officers with the approval of the stockholders, and if the stockholders cannot fix such compensation, then how can the Company function? *Cf. Lillard* v. *Oil, Paint and Drug Co.*, 70 N. J. Eq. 197, 206.

As was said by this court in *Rogers* v. *Guaranty Trust Company*, the plaintiff, as any other stockholder in buying into the Company "impliedly agreed that in respect of its internal affairs the Company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunals chosen for their vindication, are to be determined on the ascertainment and proper application of New Jersey Law."

A proper application of the New Jersey Law compels the conclusion that the stockholders had full power to adopt Article XII.

V.

Other payments or benefits under later plans which are the subjects of other suits are wholly irrelevant in this suit.

The plaintiff alleges other payments and benefits whose validity he neither admits nor controverts in the complaints in the present cause but which he says are the subjects of other suits (R., p. 14).

He prays for alternative relief, i. e., either—

(1) the adjudication of the invalidity of By-Law XII, with incidental relief, or

(2) if the By-law be held valid, that the court fix and determine as an alternative measure of relief the fair and reasonable compensation of the officers of the corporation for present, past and future services, and award relief incidental to such determination (R., p. 13).

The payments under the corporate By-Law enacted by the stockholders themselves are automatic. No action by the directors is required. Indeed the By-Law provided that it "may be modified or repealed only by the action of the stockholders of the Company and not by the directors" (R., p. 15). If this By-Law be valid, no subsequent plans for compensation can operate to repeal it.

It may be contended that the compensation thus determined by the By-Law has some bearing on other payments or benefits under later plans, but such other payments or benefits can have no bearing on the validity of the By-Law or the payments thereunder.

Since the plaintiff in other suits is attacking the validity of such other payments and benefits, he is not entitled to have them considered in this suit for any purpose.

He has elected to attack the different payments and benefits separately, the By-Law and the payments thereunder

in this suit, the benefits under the stock subscription plan in another suit, the so-called cash credits in still a third suit. If he wished to attack them in the aggregate, he should have joined in one suit the attacks which he has seen fit to make in separate suits.

Having attacked the other payments and benefits in separate suits and having expressly disaffirmed any attack upon them in this suit, they should receive no consideration and be given no effect whatever in this suit. Otherwise it is manifest that great injustice might result.

Wherefore we submit that this suit should be considered as involving solely the validity of the By-Law and the payments thereunder.

VI.

The Court will not substitute its judgment for that of the stockholders and no facts are pleaded justifying interference with the internal management of the Company.

The plaintiff cites many cases on pages 24 and 25 of his brief in support of the proposition that it is "the province of equity to revise excessive salaries and fix the reasonable compensation of officers." None of them support that proposition, which it is submitted is contrary to the settled rule that the courts will not interfere in the internal management of a corporation in the absence of fraud, actual or constructive, or of some element tantamount to fraud.

This case is absolutely barren of any such element. The individual defendants had no hand whatever in the passage of the By-Law. They accepted employment on the faith of it long after its adoption. There is no pretense that they now have or ever had anything like stock control. There is no pretense that in adopting the By-Law or in retaining it since its adoption the stockholders were actuated by any motives

whatever except the best interests of the corporation and the entire body of stockholders.

This is not a case of the diversion or use of assets for other than corporate purposes, of oppressive or unfair action by a majority of stockholders towards a minority, of directors constituting a controlling majority voting extra compensation to themselves, of the appropriation of earnings by directors without a vote of stockholders, or of paying dividends to a self-selected group under the guise of salaries. In truth the case has not a single one of the different elements which have moved courts of equity to interfere in a matter of internal management.

The stockholders, by practically a unanimous vote of those represented at the meeting, decided to give the management extra compensation in the way of profit sharing as an incentive to greater effort and more intense concentration on the business of the company. They fixed the rate at 10%—2½% for the president and 1½% for each of five vice presidents. They fixed the base as the amount of excess earnings, especially attributable to the management, above those from that part of the business for the year, prior to that in which the By-Law was adopted, after deducting an amount sufficient to pay dividends on the preferred stock.

No one would suggest that such action of the stockholders was so unreasonable or excessive as to justify the imputation of fraud. The manifest purpose was to stimulate effort with the view of increasing profits for all the stockholders. The stockholders and the management would profit therefrom in the ratio of nine to one. Certainly the plan cannot now be attacked on the ground that it has been too successful. The stockholders may have profited even beyond their expectations and doubtless that accounts for their contentment. But if they are content, it is not for a court of equity to intervene simply because the plan has succeeded even beyond expectations.

The stockholders reserved to themselves the right to modify or repeal the By-Law and expressly took that right away from the directors (R., p. 15). Three stockholders can call a meeting at any time. At such a meeting or at any annual meeting the By-Law can be amended or repealed. A court may think that the amount received by the management is too much. It may be large, but so have been the resulting profits to the stockholders amounting to over nine times as much. If the stockholders, having the powerful motive of self-interest, are content, it is not for a court to assert some supervisory power which it is not equipped or qualified to exercise.

The plaintiff has quoted from Berle and Means "The Modern Corporation and Private Property," but he overlooks passages much more pertinent to the case in hand, of which we give an example (pp. 342-343):

> "In the modern corporation, with its separation of ownership and control, these two functions of risk and control are, in the main, performed by two different groups of people. Where such a separation is complete one group of individuals, the security holders and in particular the stockholders, performs the function of risktakers and suppliers of capital, while a separate group exercises control and ultimate management. In such a case, if profits are to be received only by the security holders, as the traditional logic of property would require, how can they perform both of their traditional economic roles? Are no profits to go to those who exercise control and in whose hands the efficient operation of enterprise ultimately rests?
>
> * * * * * * * * *
>
> "Furthermore, if all profits are earmarked for the security holder, where is the inducement for those in control to manage the enterprise efficiently? When none of the profits are to be received by them, why should they exert themselves beyond the amount necessary to maintain a reasonably satisfied group of stockholders? * * * Certainly, one cannot escape the

> conclusion that if profits have any influence as a motivating force, any surplus which can be made over a satisfactory return to the investor would be better employed when held out as an incentive to action by control than when handed over to the 'owners' who have surrendered control."

Whatever may be thought, as a matter of economics, of the proper division of profits between management and stockholders, as a matter of law the stockholders acting fairly and in the interest of all have the right to give the management a contingent extra compensation measured by a share of profits and in the absence of fraud, either actual or implied, or of some element of oppression or of overreaching on the part of the majority, it is not for the courts to interfere even though they may think that the stockholders have been too liberal.

The profit-sharing rate fixed by the stockholders is not large, especially since it is computed only on profits from the part of the business most affected by management in excess of such profits the year before the adoption of the By-Law, after providing for the dividends on the Preferred Stock.

If the resulting extra compensation be thought large, that is due to the phenomenal results attributable to the management. Certainly it is for the stockholders to judge the relation of cause and effect and to determine whether they wish to hazard a continuance of the phenomenal success of the Company upon a change of policy.

The proper forum for the plaintiff to present his case is a stockholders' meeting. If he should lose his case there, the decision would be final in the absence of some showing that the stockholders were governed by improper or ulterior motives and did not fairly act in the interest of all. Certainly he has no standing in a court of equity until at least he has exhausted his remedy within the Corporation.

There is no case in the books in which the courts have ever interfered with a compensation fixed by majority stockholders who were independent of the management.

Indeed, the cases cited by plaintiff (Pltff's Br., pp. 24-25) are authorities in favor of non-interference under the circumstances of this case.

For example, the following cases hold that, where the majority stockholders have acted, a minority stockholder has no cause of complaint. *Church* v. *Harnit,* 35 Fed. (2d) 499; certiorari denied, 281 U. S. 732; *Ransome Concrete Machinery Co.* v. *Moody,* 282 Fed. 29; *Putnam* v. *Juvenile Shoe Corp.,* 307 Mo. 74.

In *Church* v. *Harnit,** 35 Fed. (2d) 499, certiorari denied, 281 U. S. 732, the facts were these: Plaintiff, a minority stockholder, brought suit against four out of five directors of the defendant, to recover bonus payments made for many years under the following circumstances: At the end of each fiscal year, the president, one of the defendants, prepared a schedule of bonus payments to be made to himself and to other officers and employes. The board of directors, the president not voting, then voted upon the bonus, approving the amount suggested by the president for himself. After that meeting, the president authorized the payment of the bonuses fixed for the three other directors as well as for the other employes. The officers were paid also a stated salary fixed by the directors. The Circuit Court of Appeals, for the Sixth Circuit, in finding for the defendants, said (p. 501):

> "* * * The business was managed with marked efficiency. Each of the defendants applied himself with peculiar energy and ability to his particular task.

* That case is of particular interest because an examination of the record discloses that the four defendant executives received from 33.18% to 47.08% of the earnings as compared to the stockholders, who received by way of cash dividends 15.04% to 44.93% of the earnings, whereas, in the instant case, the combined compensation to the executives of salaries and compensation under Article XII ran from 3.03% to 6.47% of the earnings, and the cash dividends were never under 60.45% and reached a maximum of 95.75% of the earnings of the Company (R., pp. 9, 84, 84A).

> Each served through the succeeding years with the understanding and expectation that he would receive additional compensation if his loyalty and industry merited, and the success of the business warranted, such allowances. The company would now be estopped to deny that such was the contract of employment. *Letta* v. *Cincinnati Iron & Steel Co.*, 285 F. 707 (C. C. A. 6)."

The Court said of the very contention now raised by plaintiff (p. 502):

> "It is further contended that it was beyond the power of Harnit to enter into such contracts with his subordinates and beyond the power of such subordinates as constituting a majority of the board of directors to approve the allowance of compensation to Harnit. For more than twenty years the contracts of Hewitt, Sinclair, and Hein have been handled by the chief executive, and in the absence of direct action by the board of directors. This had been with the knowledge of the board and with the implied assent of the stockholders. The employment of subordinates comes directly within the apparent scope of the authority of the president, and, when such executive has acted as if so authorized for a long period of years, this court has frequently held that there is an implied ratification, and the contracts of employment will be upheld." (Citing cases.)

The other cases cited by plaintiff (Pltff's Br., pp. 24-25) involve situations where:

> (1) the directors voted compensation to themselves after the services were completed; *Schall* v. *Althaus*, 208 N. Y. App. Div. 103, 106;
>
> (2) the stockholders had no voice in fixing the compensation and the directors voted the compensation to themselves; *Mitchell* v. *United Box Board & Paper Co.*, 72 N. J. Eq. 580, 585; *Gardner* v. *Butler*, 30 N. J. Eq. 702; *Raynolds* v. *Diamond Mills Paper Co.*, 69

N. J. Eq. 299; *McMahon* v. *Bardette*, 106 N. J. Eq. 79, 80; *Stratis* v. *Andreson*, 254 Mass. 536; *Nichols* v. *Olympia Veneer Co.*, 139 Wash. 305; *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411; *Collins* v. *Hite*, 109 W. Va. 79; *Lowman* v. *Harvey R. Pierce Co.*, 276 Pa. 382;

(3) the compensation voted was in the nature of dividends to the exclusion of other stockholders; *Godley* v. *Crandall & Godley Co.*, 153 N. Y. App. Div. 697, 710; *Scott* v. *P. Lorillard Co.*, 108 N. J. Eq. 153, aff'd 109 N. J. Eq. 417;

(4) the directors were the majority stockholders; *Lillard* v. *Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 204; *Wight* v. *Beublein*, 238 Fed. 321; *Atwater* v. *Elkhorn Valley Coal-Land Co.*, 184 N. Y. App. Div. 253, 258; *McKay* v. *Swenson*, 222 Mich. 505; *Decatur Mineral & Land Co.* v. *Palm*, 113 Ala. 531, 537; *Backus* v. *Finkelstein*, 23 Fed. (2d) 531, 537."

In *Booth* v. *Beattie*, 95 N. J. Eq. 776, the Court of Errors and Appeals upheld the principle of compensation to an officer of a New Jersey corporation based upon a share of the profits.

Indeed, the courts have repeatedly ruled that questions such as the one here presented, involving corporate internal affairs, belong, in the absence of fraud or breach of trust, within the domain of the corporate body and upon which the stockholders are the courts of last resort. *Consolidated Cement Corp.* v. *Pratt*, 47 Fed. (2d) 90; *Bisbee* v. *Midland Linseed Products Co.*, 19 Fed. (2d) 24; *Robinson* v. *Benbow*, 298 Fed. 561; *Brictson Mfg. Co.* v. *Close*, 280 Fed. 297; *DuPont* v. *DuPont*, 256 Fed. 129, certiorari denied 250 U. S. 642; *Heinz* v. *National Bank of Commerce*, 237 Fed. 942; *Madsen* v. *Burns Bros.*, 108 N. J. Eq. 275; *Elevator Supplies Co.* v. *Wylde*, 106 N. J. Eq. 163; *Kelly* v. *Kelly-Springfield Tire Co.*, 106 N. J. Eq. 545; *General Investment Co.* v. *American Hide & Leather Co.*, 97 N. J. Eq. 214; *Storrs* v. *James Butler Grocery Co.*, 96 N. J. Eq. 359;

Farmers Loan & Trust Co. v. *Hewitt,* 94 N. J. Eq. 65; *Putnam* v. *Juvenile Shoe Corp.,* 307 Mo. 74; *Seitz* v. *Union Brass & Metal Mfg. Co., et al.,* 152 Minn. 460; *Wellington Bull & Co., Inc.* v. *Morris,* 132 Misc. 509, affd. 226 App. Div. 868.

Plaintiff contends that, if there is no relation between the services rendered and the payments made, they amount to a gift. The fallacy in plaintiff's contention lies in the fact that nowhere does he charge that the services rendered by the officers entitled to compensation under Article XII were not valuable or conducive to the results. On the contrary, the record is undisputed that the services rendered by these defendants—and so the Circuit Court of Appeals found—were extraordinarily successful. The resulting profits alone,—particularly over such a long period of time, in the face of strong competition, and despite changing and adverse economic conditions,—demonstrate the value and success of those services.

The defendants earned their compensation. The magnitude of the Company, the diversity of its products, the infinitesimal profit on each item of its merchandise, the alert intensive rivalry of its competitors, all compel the employment of exceptionally able executives. Their worth and value to the Company must be measured by the services rendered and the results produced. Returns to stockholders in the form of annual cash dividends are indisputable facts, and, when those dividends are the fruits of the labor, there can be no better measuring rod or guide for the determination of the value of that labor than the earned profits which make such dividends possible.

In *Jacobson* v. *Brooklyn Lumber Co.,* 184 N. Y. 152, relied upon by plaintiff, the defendants, who were directors and majority stockholders, had voted to themselves salaries after the completion of the services, and had attempted to justify the value of those services by the rise in the market value of the stock. The court found that the corporation had

never promised to pay the individual directors the salaries involved.

What measuring rod could a court use to determine future compensation of officers? Shall a court lay down a rule for stockholders as to the maximum amount of compensation to be paid to its executives—that is, assume to run the business for a corporation? What past criterion can be used as a guide for the future admeasurement of executives' compensation? There is a marked difference between actual, practical working conditions and theoretical dogmas of economy. Great businesses are not run by dogmas but by the most sensitive and delicate practical adjustments. There is even a greater difference between the opinions of those who are financially interested, that is, the stockholders, as to what is a fair compensation for their employes, and the opinions of writers, whose opinions are founded for the most part, if not wholly, upon no practical consideration or experience, and who could hardly assume to know how to sell hundreds of millions of cigarettes a day upon an infinitesimal profit per unit.

Why should not a corporate enterprise be permitted to offer its chief executives the same chances for legitimate financial gain which private enterprises can hold out to them?

This attempt to interfere with the compensation which the stockholders wish to pay its executives is an attack upon the heart of their enterprise. Such interference might be a death blow to their investment.

VII.

Laches.

It is a fundamental principle of equity that a right, if any there be, must be asserted diligently and before there has been a change of position upon the part of those against whom that right is sought to be asserted. *Window Glass Mach. Co.* v. *Pittsburgh Plate Glass Co.*, 46 Fed. (2d) 484;

Haynes & Co. v. *Druggists' Circular,* 32 Fed. (2d) 215; *Atlantic Life Ins. Co.* v. *Rowland,* 22 Fed. (2d) 126; *Backus-Brooks Co.* v. *Northern Pac. Ry. Co.,* 21 Fed. (2d) 4; *Weniger* v. *Success Mining Co.,* 227 Fed. 548; *Marks* v. *Merrill Paper Co.,* 203 Fed. 16; *Collins* v. *Penn-Wyoming Copper Co.,* 203 Fed. 726; *Kessler* v. *Ensley Co.,* 123 Fed. 546; *Edwards* v. *Mercantile Trust Co.,* 124 Fed. 381; *Eiffert* v. *Craps,* 58 Fed. 470; *Jesup* v. *Illinois Cent. R. Co.,* 43 Fed. 483; *Hardt* v. *Heidweyer,* 152 U. S. 547.

Plaintiff's contention that he did not have actual knowledge of Article XII prior to February, 1931, does not countervail the defense of laches. This court has ruled that legal or constructive knowledge is all that is required. *Galliher* v. *Cadwell,* 145 U. S. 368; *cf. Atlantic Life Ins. Co.* v. *Rowland,* 22 Fed. (2d) 126, and *Spiller* v. *St. Louis & S. F. R. Co.,* 14 Fed. (2d) 284. Of course, plaintiff has constructive notice of the By-Law. (See cases cited, *supra,* p. 42.)

Plaintiff admits, and has never denied, that these officers rendered their services upon the inducement and representation that Article XII was a part of their contract of hire. There can be no tendering back to these defendants the energy, the labor, the services, and the ability that they have expended in and upon the affairs of the Company. They cannot be restored to the *status quo.*

After nineteen years a single stockholder seeks to impose his will upon the balance of the stockholders and would constitute himself the sole arbiter of this most important function of internal affairs.

In place of objecting to Article XII, or introducing a resolution to change it, plaintiff has during the many years that he has been a stockholder remained silent and acquiesced in the election of officers entitled to compensation thereunder, and permitted the officers so elected to surrender their opportunities in other fields, all while he himself has received tremendous returns upon his original investment.

On the question of laches see *Dana* v. *The American Tobacco Co.*, 72 N. J. Eq., 44, 49, affd. 73 N. J. Eq. 736, a leading case in New Jersey, the principle of which has been approved by the following cases: *Schuler* v. *Southern Iron & Steel Co.*, 77 N. J. Eq. 60; *Lazear* v. *American Steel Foundries*, 86 N. J. Eq. 21; *Windhurst* v. *Central Leather Co.*, 101 N. J. Eq. 543.

Plaintiff quotes from the opinion in *Endicott* v. *Marvel*, 81 N. J. Eq. 378. This case was affirmed by the Court of Errors and Appeals in 83 N. J. Eq. 632, where the only question decided was that certain transactions constituted a pledge of the corporation's stock by certain of its directors to themselves, and not a sale of that stock to those directors. The court accordingly said that under those circumstances there could be no question of laches in redeeming the pledge. Moreover, the Vice-Chancellor at *nisi prius* referred only to laches in actions where there had never been notice to the stockholders, whereas, in the case at bar, Article XII, was adopted by the stockholders in 1912, and has always been a matter of record. In the *Endicott* case it was also made clear that a contract between the directors and their corporation is not void but voidable, not at the instance of a single stockholder, but only at the instance of the corporation, which must act promptly.

Upon the general proposition of laches, the following New Jersey cases are also of importance: *Dalsheimer* v. *Graphic Arts Co.*, 86 N. J. Eq. 49; affd. 89 N. J. Eq. 210; *Crawford* v. *Lees*, 84 N. J. Eq. 324; *Rabe* v. *Dunlap*, 51 N. J. Eq. 40.

VIII.

Conclusion.

The case presented by plaintiff involves fundamentally the validity of Article XII adopted by the Company's stockholders in 1912. Incidental to that primary issue, the bill asks other relief, viz.: (1) the return of all compensation paid to the individual defendants under Article XII, and (2) a determination by the Court of future salaries of all the officers presumptively entitled to compensation thereunder.

Plaintiff's attack upon the validity of Article XII and his attempt to have a Court supplant the stockholders in fixing compensation of the Company's executives bring to the front the following considerations:

Plaintiff's theory is that a court must assume the responsibility and obligation of fixing compensation beyond which no further or other compensation can be paid to any executive of the Company notwithstanding that the stockholders have determined that compensation. This he would have a court undertake for all future times irrespective of the Company's condition or the nature of the work imposed upon the executives.

A fortiori if the executives should be unwilling to work for the compensation fixed by a court it is but logical to assume that a court would be asked to obtain executives willing and able to undertake for that compensation the responsibilities entailed in the management of this world-wide enterprise with the same satisfactory results. The economic aspects and business policy of a successful going corporation are proper subjects for the stockholders. The assumption by a court of such functions would be extraordinary and impossible.

It is elementary in modern business that any individual or group of individuals can employ an executive on salary or commission or both. Accordingly, a business corpora-

tion, which consists of a group of individuals who contribute only capital, must be permitted to employ agents for an agreed compensation. One who by acquisition of stock joins such a group impliedly agrees that, in respect of its internal affairs, he is to be governed by the rules laid down by the majority. There is no subject more clearly within the province of the group constituting the entity than the compensation of its agents. Any dissatisfied member can present his views before a group meeting to persuade them that he is right.

But the stockholders of this Company have not omitted any act to establish and maintain this rule of executive compensation for the success of their business. The rule was adopted first at an annual meeting with special notice to every stockholder. At that meeting the vote was practically unanimous. The rule has been maintained as a principle of compensation unbroken ever since. This despite all of the plaintiff's attacks, legal or otherwise, which during the last three years have been brought home to every stockholder of record. In order that there could be no possible doubt that every stockholder had full knowledge of the By-Law, the Company mailed to each stockholder in March, 1931, prior to the annual meeting a pamphlet (R., pp. 88-90) which summarized and explained fully the provisions and working of Article XII.

Moreover, the stockholders lifted this rule out of the general run of By-Laws, and it was the only By-Law so treated, by declaring that it could not be amended or repealed unless by their own vote. After all these years of continued operation and even up to date, not a single move has been made to amend or repeal it by any stockholder, except the plaintiff, despite the fact that any three stockholders out of a total of 40,000 could have called for its reconsideration or revision at any time. Such is the background of this Article XII and such the adherence to it by the stockholders of this Company.

If the objection is made that the pay is excessive, that is a matter for decision by the stockholders. Once it be estab-

lished that the stockholders may validly adopt a principle of business by which its executives' compensation shall be fixed, it must follow that the amount of compensation is a matter peculiarly and exclusively within their prerogative.

In this Company, the stockholders have duly exercised their power and have followed a course which has made their business so successful.

The question here presented is not complicated by any features of fraud or deception. *This plan for compensation was not devised or invented by the defendants.* It was designed to accomplish just what it has accomplished—to bring this Company to the fore-front of successful companies of the world. They found it of record when they were elected to their present offices. They have been hired under it for successive years. For years they have rendered their services in reliance upon this inducement as an essential term of their contract of employment. During this period, they have paid heavy income taxes based upon that compensation; have earned large profits for the Company; have paid tremendous returns to the stockholders upon the capital contributed.

Yet, plaintiff, a single stockholder who bought into this Company after Article XII was adopted, seeks not only to destroy the Company's personnel, and shatter its marvelous efficiency, but even to ruin the executives by compelling them to return all compensation paid thereunder, while having the Company retain all the profits; indeed to penalize these defendants for relying upon the good faith of their employers—the stockholders—and for making an outstanding success of the Company.

Respectfully submitted,

NATHAN L. MILLER,
WILLIAM M. PARKE,
J. ARTHUR LEVE,
Counsel for Respondents.

APPENDIX A.

Article XII.

Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent. of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent. of such amount, to the President; one-fifth of the remainder thereof, or 1½ per cent. of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as its proportionate to the time of such vacancy shall be returned into the general profit account of the Company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Company for

depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent. dividends on $52,459,400 of its 6 per cent. preferred stock, to which profits shall be added, or from which profits shall be deducted, as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Company, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited.

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company, and nothing herein contained shall give any incumbent of any office any right to claim to continue therein, or any other right except as herein specifically expressed.

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors (R., pp. 36-38).

CORRECTED COPY p. 6

SUPREME COURT OF THE UNITED STATES.

No. 732.—October Term, 1932.

Richard Reid Rogers, Petitioner,
vs.
George W. Hill, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 29, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

The American Tobacco Company is a corporation organized under the laws of New Jersey. The petitioner, plaintiff below, acquired in 1916 and has since been the owner of 200 shares of its common stock. He also has 400 shares of common stock B. In accordance with by-law XII,[1] adopted by the stockholders at their

[1]Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent of such amount, to the President; one-fifth of the remainder or 1½ per cent of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers. . . .

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted, as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), limited. . . .

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors."

annual meeting, March 13, 1912, the company for many years has annually paid its president and vice-presidents large amounts in addition to their fixed salaries and other sums allowed them as compensation for services.[2]

Plaintiff maintains that the by-law is invalid and that, even if valid, the amounts paid under it are unreasonably large and therefore subject to revision by the courts. In March, 1931, he demanded that the company bring suit against the officers who have received such payments to compel them to account to the company for all or such part thereof as the court may hold illegal. The company, insisting that such a suit would be without basis in law or fact, refused to comply with his demand. He brought suit in the supreme court of New York against the president and some of the vice-presidents to require them so to account, and joined the company as defendant. The case was removed to the federal court for the southern district of New York. In May, 1931, plaintiff brought suit in that court against Taylor, a vice-president, not a defendant in the earlier suit, to require him to account and made the company defendant. The cases were consolidated, plaintiff filed an amended complaint and defendants answered. The officers of the company now before the court are

[2]The statement below shows for the years specified the amounts alleged to have been paid by the company to the named defendants as salary, credits, and under by-law XII.

	Salary	Cash Credits	By-Law	
Hill				
1921			$89,833.84	Vice President
1922			82,902.61	
1923			77,336.54	
1924			88,894.26	
1925			97,059.38	
1926	$75,000		188,643.45	President
1927	75,000		268,761.45	
1928	75,000		280,203.68	
1929	144,500	$136,507.71	447,870.30	
1930	168,000	273,470.76	842,507.72	
Neiley				
1929	$33,333.32	$44,897.89	$115,141.87	
1930	50,000.00	89,945.52	409,495.25	
Riggs				
1929	$33,333.32	$45,351.40	$115,141.87	
1930	50,000.00	90,854.06	409,495.25	

Hill, the president, Neiley, Riggio and Taylor, vice-presidents. The answer, after admissions, denials and explanations asserts several separate defenses.

Plaintiff made a motion on the pleadings for judgment that the separate defenses be stricken, the by-law be adjudged invalid and defendants Hill, Neiley and Riggio be required to account for amounts so paid them and that further payments be enjoined; and in the alternative that such payments be restrained *pendente lite*. After argument upon the motion, the court, without decision upon any other question, granted a temporary injunction. Defendants appealed, the Circuit Court of Appeals reversed the interlocutory order and directed that a mandate issue to the District Court "in accordance with this decree". The mandate directed further proceedings in accordance with "the decision". On the coming down of the mandate, the district court vacated the temporary injunction and dismissed the bills of complaint upon the merits. Plaintiff appealed, the Circuit Court of Appeals affirmed, citing its opinion on the former appeal, and this court granted plaintiff's petition for writ of certiorari. 288 U. S. —.

Defendants, renewing a contention made in opposition to the petition for certiorari, assert that the appellate court on the first appeal determined in favor of defendants all the issues presented by the complaint, and maintain that, no application for certiorari having been made within three months after that decision, the only question that this court now has power to decide is whether the mandate directed dismissal.

We are of opinion that the mandate did not direct dismissal. The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 338. *Meccano, Ltd.*, v. *John Wanamaker*, 253 U. S. 136, 141. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 526. The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits but the decree did not extend beyond mere reversal of the order from which the appeal was taken. It directed that mandate issue in accordance with "this decree". The mandate commanded proceedings in accordance with "the decision". A direction for proceedings in accordance with "the opinion"

makes it a part of the mandate. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136. Here the mandate was to proceed not in accordance with the "opinion" but with the "decision". These words, while often loosely used interchangeably, are not equivalents. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. *Houston* v. *Williams,* 13 Cal. 24, 27. *Adams* v. *Railroad Co.,* 77 Miss. 194, 304. *Craig* v. *Bennett,* 158 Ind. 9, 13. *Coffey* v. *Gamble,* 117 Ia. 545, 548. The Judicial Code uses "decision" as the equivalent of "judgment" and "decree". §§ 128, 238. As a mandate in the words of the decree was unquestionably sufficient to give effect to the ruling of the appellate court, "decision" may not reasonably be held to have been used for "opinion".

Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his bills of complaint. *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 182. *Metropolitan Co.* v. *Kaw Valley District,* 223 U. S. 519, 523. *Mutual Life Insurance Co.* v. *Hill,* 193 U. S. 551, 553. *Smith* v. *Adams,* 130 U. S. 167, 177. In any view of the matter, it is clear that the decree of the appellate court was not final and that plaintiff, in order to have the validity of the payments considered here, was not bound within three months after entry to petition this court for a writ of certiorari.

Plaintiff contends that the stockholders were not authorized to adopt the by-law under which the payments were made.

Section 11, General Corporation Act, Laws, 1896, c. 185, provides: "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders". The charter empowers the directors to make and alter by-laws. But plaintiff argues that the stockholders having delegated to the directors authority to adopt by-laws lost the power to adopt the one in question. That is inconsistent with

the purpose of the statute. Power to prescribe rules for the government of business corporations reasonably is deemed an incident of ownership and the voting power of the shares. It is quite generally conferred by statute or charter provisions upon the stockholders. Here the statutory grant to them is plenary. The charter provision is subordinate and not inconsistent. There are many thousand holders of shares of this corporation. Their annual meetings are the only regular ones, but the directors meet frequently. The company's business is extensive and complex and considerations of convenience may have suggested delegation to directors of authority to make and alter by-laws.

That the statute did not intend to divest stockholders is clear for it expressly makes by-laws passed by directors subject to alteration and repeal by the stockholders. In the absence of statutory provision definitely and clearly disclosing that intention, a charter provision or by-law adopted by incorporators or shareholders delegating power to directors may not reasonably be held to take from the stockholders any of the power conferred upon them by the statute. Plaintiff's contention would leave the stockholders full power to alter and repeal by-laws made by directors but would deny them power to originate or adopt any by-law or to amend or repeal those made by themselves. We find no reason in support of that construction. Moreover, it seems in direct conflict with the decision of the highest court of New Jersey. In the case of *Griffing Iron Co.*, 63 N. J. L. 168, affirmed in the Court of Errors and Appeals on the opinion below, 63 N. J. L. 357, the court declared (p. 171): ". . . That the stockholders had delegated to the directors power to amend the by-laws did not curtail their own power to amend them, and of course the later statute [Revision, 1896] removed all possible restriction on such power . . . It would be preposterous to leave the real owners of the corporate property at the mercy of their agents, and the law has not done so." The plaintiff cites and quotes from *Scott* v. *P. Lorillard Co.*, 108 N. J. Eq. 153, affirmed 109 N. J. Eq. 417. But, when regard is had to the questions considered in that case, there is nothing in the opinion that lends support to his contention. It cannot be sustained.

Plaintiff suggests that, because the by-law purports to direct payments out of profits, it violates charter provisions which he construes to require the directors to apply all profits to the acquisition of property and the payment of dividends. We need not

examine the charter for the contention rests upon a misapprehension of the meaning of "profits" as used in the by-law. As there defined it includes the sums to be paid to the president and vice-presidents. Compensation to an officer for his services constitutes a part of operating expenses deductible from earnings in order to ascertain net profits. It is immaterial whether such compensation is a fixed salary or depends in whole or in part upon earnings. There is no conflict between the charter and the by-law. *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320, 323. *Booth* v. *Beattie*, 95 N. J. Eq. 776.

It follows from what has been shown that when adopted the by-law was valid. But plaintiff alleges that the measure of compensation fixed by it is not now equitable or fair. And he prays that the court fix and determine the fair and reasonable compensation of the individual defendants, respectively, for each of the years in question. But the allegations of the complaint are not sufficient to permit consideration by the court of the validity or reasonableness of any of the payments on account of fixed salaries or of special credits or of the allotments of stock therein mentioned. Indeed, plaintiff alleges that other proceedings have been instituted for the restoration of special credits, and his suits to invalidate the stock allotments were recently considered here. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123. The only payments that plaintiff by this suit seeks to have restored to the company are the payments made to the individual defendants under the by-law.

We come to consider whether these amounts are subject to examination and revision in the district court. As the amounts payable depend upon the gains of the business, the specified percentages are not *per se* unreasonable. The by-law was adopted in 1912 by an almost unanimous vote of the shares represented at the annual meeting and presumably the stockholders supporting the measure acted in good faith and according to their best judgment. The tabular statement in the margin shows the payments to individual defendants under the by-law. Plaintiff does not complain of any made prior to 1921. Regard is to be had to the enormous increase of the company's profits in recent years. The 2½ per cent. yielded President Hill $447,870.30 in 1929 and $842,507.72 in 1930. The 1½ per cent. yielded to each of the vice-presidents, Neiley and Riggio, $115,141.86 in 1929 and $409,495.25 in 1930 and for these years payments under the by-law were in addition to the cash credits and fixed salaries shown in the statement.

While the amounts produced by the application of the prescribed percentages give rise to no inference of actual or constructive fraud, the payments under the by-law have by reason of increase of profits become so large as to warrant investigation in equity in the interest of the company. Much weight is to be given to the action of the stockholders, and the by-law is supported by the presumption of regularity and continuity. But the rule prescribed by it cannot, against the protest of a shareholder, be used to justify payments of sums as salaries so large as in substance and effect to amount to spoliation or waste of corporate property. The dissenting opinion of Judge Swan indicates the applicable rule: "If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part and the majority stockholders have no power to give away corporate property against the protest of the minority". The facts alleged by plaintiff are sufficient to require that the district court, upon a consideration of all the relevant facts brought forward by the parties, determine whether and to what extent payments to the individual defendants under the by-laws constitute misuse and waste of the money of the corporation. *Booth* v. *Beattie*, 95 N. J. Eq. 776. *Scott* v. *P. Lorillard Co.*, 108 N. J. Eq. 153, 156; affirmed 109 N. J. Eq. 417. *Nichols* v. *Olympic Veneer Company*, 139 Wash. 305, 311. *Collins* v. *Hite*, 109 W. Va. 79, 84. *Putnam* v. *Juvenile Shoe Corporation*, 307 Mo. 74, 91 *et seq. Stratis* v. *Andreson*, 254 Mass. 536, 539. *Lillard* v. *Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 206-209. *Wight* v. *Heublein*, 238 Fed. 321, 324. *Seitz* v. *Union Brass & Metal Brass Mfg. Co.*, 152 Minn. 460, 464. *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411, 422-423.

The separate defenses set up in the answer to the amended complaint are: failure of plaintiff to comply with Equity Rule 27, ratification, forum *non conveniens*, laches, and that the payments were justified. As they were not passed on below, we refrain from expressing opinion concerning them. The decree of the Circuit Court of Appeals is reversed, the decree of the district court dismissing the bills on the merits is vacated, and the case is remanded to the district court with directions to reinstate its decree granting injunction *pendente lite* and for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.